

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Improving Public Safety Communications in the)	WT Docket 02-55
800 MHz Band)	
)	
Consolidating the 800 and 900 MHz)	
Industrial/Land Transportation and Business Pool)	
Channels)	
)	
Amendment of Part 2 of the Commission's Rules)	ET Docket No. 00-258
to Allocate Spectrum Below 3 GHz for Mobile)	
and Fixed Services to Support the Introduction of)	
New Advanced Wireless Services, including Third)	
Generation Wireless Systems)	
)	
Petition for Rule Making of the Wireless)	RM-9498
Information Networks Forum Concerning the)	
Unlicensed Personal Communications Service)	
)	
Petition for Rule Making of UT Starcom, Inc.,)	RM-10024
Concerning the Unlicensed Personal)	
Communications Service)	
)	
Amendment of Section 2.106 of the Commission's)	ET Docket No. 95-18
Rules to Allocate Spectrum at 2 GHz for use by)	
the Mobile Satellite Service)	

SUPPLEMENTAL ORDER AND ORDER ON RECONSIDERATION

Adopted: December 22, 2004

Released: December 22, 2004

By the Commission: Commissioner Copps concurring and issuing a separate statement;
Commissioner Adelstein issuing a separate statement.

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I. INTRODUCTION

1. On July 8, 2004, we adopted technical and procedural measures to address the ongoing and growing problem of interference to public safety communications in the 800 MHz band.¹ In the *800 MHz R&O*, we concluded that a Commission-derived plan comprised of both long-term and short-term components represented the most effective solution to the public safety interference problem in the 800 MHz band. We addressed the ongoing interference problem over the short-term by adopting technical

¹ See Improving Public Safety Communications in the 800 MHz Band, WT Docket 02-55, *Report and Order, Fifth Report and Order, Fourth Memorandum Opinion and Order, and Order*, 19 FCC Rcd 14969 (2004) as amended by *Erratum*, DA 04-3208, 19 FCC Rcd 19651 (2004) and *Erratum*, DA 04-3459, rel. Oct. 29, 2004 (*800 MHz R&O*).

standards defining unacceptable interference in the 800 MHz band, as well as procedures detailing responsibility for abating this interference and the steps parties must take to abate the interference.² The long-term component augmented the short-term component by reconfiguring the 800 MHz band to separate generally incompatible technologies whose current proximity to each other is the identified root cause of unacceptable interference.³

2. Subsequent to the release of the *800 MHz R&O*, parties made a series of *ex parte* presentations which provided additional information.⁴ The Commission issued a *Public Notice* soliciting comment on certain presentations filed in this docket.⁵ Based on this supplementary record and review of the *800 MHz R&O* by Commission staff, we believe it appropriate to make certain clarifications of, and changes to, the provisions of the *800 MHz R&O* and its accompanying rules.⁶ We believe these changes will facilitate a more efficient and timely reconfiguration of the 800 MHz band.

3. In this *Order*, we clarify and revise portions of the *800 MHz R&O* to create an environment conducive to the efficient implementation of 800 MHz band reconfiguration. These clarifications and revisions include:

- Explicitly requiring Nextel to submit its 700 MHz Guard Band licenses to the Commission for

² See *800 MHz R&O*, 19 FCC Rcd 15021-15045 ¶¶ 88-141 (adopting new standards for protecting public safety, critical infrastructure and other 800 MHz “high-site” licensees, from CMRS interference).

³ See *800 MHz R&O*, 19 FCC Rcd 15045-15079 ¶¶ 142-207 (adopting new 800 MHz band plan spectrally separating public safety and critical infrastructure users and other “high-site” licensees from Enhanced Specialized Mobile Radio (ESMR) systems using “low site” architecture).

⁴ See Letter from Regina M. Keeney, Esq., Counsel to Nextel Communications, Inc. (Nextel), to Marlene H. Dortch, Secretary, Federal Communications Commission (FCC) (filed Aug. 30, 2004); Letter from R. Michael Senkowski, Esq., Counsel for Verizon Wireless, to Michael Powell, Chairman, FCC, dated Sep. 15, 2004; Letter from Regina M. Keeney, Esq., Counsel to Nextel to Marlene H. Dortch, Secretary, FCC (filed Sep. 16, 2004) (*Sep. 16th Nextel Ex Parte*); Letter from Regina M. Keeney, Esq., Counsel to Nextel to Marlene H. Dortch, Secretary, FCC (filed Sep. 21, 2004) (*Sep. 21 Nextel Ex Parte*) (providing revised figures regarding Nextel’s spectrum contributions to the 800 MHz band reconfiguration among other things); Letter from Elizabeth R. Sachs, Esq., Counsel for Airpeak Communications LLC and Airtel Wireless Services, LLC, to Michael Powell, Chairman, FCC (filed Sep. 23, 2004) (*AIRPEAK/Airtel Ex Parte*); Letter from Regina M. Keeney, Esq., Counsel to Nextel to Marlene H. Dortch, Secretary, FCC (filed Sep. 23, 2004) (*Sep. 23 Nextel Ex Parte*) (discussing procedural and logistical issues regarding the letter of credit); Letter from Lawrence R. Krevor, Vice-President-Government Affairs, Nextel to Marlene H. Dortch, Secretary, FCC (filed Sep. 28, 2004) (*Interference Standard Ex Parte*) (proposing an interim interference standard); Letter from Regina M. Keeney, Esq., on behalf of Nextel to Marlene H. Dortch, Secretary, FCC (filed Oct. 1, 2004) (*Oct. 1 Nextel Ex Parte*); Letter from Robert M. Gurs, Esq., Director, Legal and Regulatory Affairs, Association of Public Safety Communications Officials International, Inc., (APCO) to Michael K. Powell, Chairman, FCC (filed Oct. 5, 2004) (*APCO Ex Parte*).

⁵ See Commission Seeks Comment On Ex Parte Presentations And Extends Certain Deadlines Regarding The 800 MHz Public Safety Interference Proceeding, WT Docket No. 02-55, *Public Notice*, FCC 04-253, (rel. Oct. 22, 2004). This *Order* addresses the critical issues, but not all issues, raised in the *ex parte* submissions, *supra* and comments thereon.

⁶ As a general matter, the Commission may, on its own motion, reconsider any action made or taken by it within thirty days from the date of Public Notice of such action. See 47 C.F.R. § 1.108. Here, the date of Public Notice was the November 22, 2004, publication of the *800 MHz R&O* in the Federal Register. See 69 FR 67823 (Nov. 22, 2004) (R&O)

cancellation.

- Modifying provisions relating to the letter of credit to provide that the letter of credit will serve as a security against default, and will not constitute the corpus of band reconfiguration funds absent a default. We also provide that up to ten financial institutions may issue the letter or letters of credit under certain conditions and provide that we will consider waiver of the conflict of interest provisions governing the Trustee.
- Clarifying the scope of the acknowledgment that Nextel must file with the Commission as part of its acceptance of the terms and provisions of the *800 MHz R&O*.
- Clarifying the entities from which Nextel must obtain a Letter of Cooperation, committing such entities to make changes necessary to implement 800 MHz band reconfiguration.
- Analyzing more recent and comprehensive data on the spectrum holdings of Nextel and revising, accordingly, the credit Nextel receives for spectrum it must surrender as part of the band reconfiguration process.
- Setting interim received power level thresholds that non-cellular systems must maintain in order to claim protection against unacceptable interference during band reconfiguration. These interim threshold levels will remain in effect until band reconfiguration in a particular 800 MHz National Public Safety Planning Advisory Committee (NPSPAC) region is complete at which time the threshold levels adopted in the *800 MHz R&O* go into effect.
- Setting out provisions for abating interference to public safety systems that do not meet the interim received power level thresholds during the period in which said interim received power level thresholds are in effect.
- Clarifying and amplifying certain actions falling within the *800 MHz R&O* requirement that parties conduct their relocation negotiations in good faith.
- Modifying the eighteen-month benchmark so that, by that time, Nextel shall have relocated all non-Nextel and non-SouthernLINC incumbents from the former General Category channels 1-120 in at least twenty NPSPAC regions, and shall have initiated relocation negotiations with all NPSPAC licensees in said regions.
- Clarifying that mobile-only systems operating on a secondary basis on former General Category Channels 1-120 may continue to operate on said channels on a secondary basis.
- Clarifying when public safety and Critical Infrastructure Industry (CII) licensees⁷ gain exclusive

⁷ See *800 MHz R&O*, 19 FCC Rcd 14973 n.11. For purposes of this proceeding, we defined CII licensees as those entities, outside of the scope of the "public safety service" definition of [47 U.S.C. § 337\(f\)](#), but which operate "public safety" radio services within the scope of [Section 309\(j\)\(2\)](#) of the Communications Act, as amended. [47 U.S.C. § 309\(j\)\(2\)](#) defines "public safety radio services" as including private internal radio services used by State and local governments and non-government entities, and including emergency road services provided by not-for profit organizations, that: (i) are used to protect the safety of life, health, or property; and (ii) are not made commercially available to the public. Examples of CII licensees include 800 MHz systems that provide private internal radio services used by utilities, railroads, metropolitan transit systems, pipelines, private ambulances, volunteer fire departments, and not-for-profit organizations that offer emergency road services, such as the American Automobile Association.

access to channels vacated by “Enhanced Specialized Mobile Radio” (ESMR) licensees as a part of band reconfiguration.⁸

- Specifying that non-public safety and non-CII incumbents operating on Channels 231-260 may continue to operate on these channels.
- Clarifying that a Commission-certified coordinator must coordinate channels vacated by ESMR licensees and applied for after completion of band reconfiguration of a given NPSPAC region.
- Declining to impose a two percent limit on administrative costs associated with incumbent relocation.
- Elaborating on the duties and authority of the Transition Administrator.
- Clarifying which Economic Area (EA) licensees are eligible for relocation to channels above 817 MHz/ 862 MHz.
- Declining to afford relocating licensees their choice of channels, provided that they are relocated to comparable facilities.
- Declining to require that relocating licensees be assigned channels in any particular sequence, but leaving such determination to the Transition Administrator.
- Defining the parameters governing the voluntary relocation of CMRS licensees to the Guard Band.
- Clarifying the extent to which Nextel may be involved in the physical process of retuning incumbent systems.
- Prohibiting “high site” systems above 817 MHz/862 MHz.
- Clarify that relocation of EA licensees does not constitute issuance of “new” licenses.
- Clarifying that license modifications necessary to implement band reconfiguration do not implicate the Commission’s “unjust enrichment” rule.
- Modifying the rules affecting the “freeze” on 800 MHz license modification applications during reconfiguration of a given NPSPAC region.
- Clarifying the applicability of Section 22.917 of the Rules to cellular systems causing interference to 900 MHz systems.

II. BACKGROUND

4. As discussed throughout this proceeding, the interference problem in the 800 MHz band is caused by a fundamentally incompatible mix of two types of communications systems: cellular-architecture multi-cell systems used by ESMR and cellular telephone licensees and high-site non-cellular systems used by public safety, private wireless, and some SMR licensees.⁹ Public safety entities became

⁸ See 47 C.F.R. § 90.7 for a definition of what constitutes an ESMR licensee.

⁹ See *800 MHz R&O*, 19 FCC Rcd 14972-73 ¶ 2.

aware of this problem in the late 1990s. In April 2000, the Commission convened a meeting of representatives from major stakeholders in the 800 MHz band to address the growing problem of interference to 800 MHz public safety systems. As an outcome of the meeting, the parties published the *Best Practices Guide*, which contained technical modifications and procedures to reduce interference.¹⁰

5. On November 21, 2001, Nextel filed a White Paper proposing reconfiguration of the 800 MHz band to abate the interference being caused to 800 MHz public safety systems.¹¹ One month later the National Association of Manufacturers (NAM) and Manufacturers Radio Frequency Advisory Committee (MRFAC), one of the Commission's certified frequency coordinators, made a joint filing wherein they advanced a band reconfiguration plan which they claimed could be implemented without the need to give Nextel the requested 2.1 GHz spectrum.¹² The Commission issued a *Notice of Proposed Rule Making (NPRM)* seeking comment on band reconfiguration, generally, on the Nextel and NAM/MRFAC proposals and on a variety of related issues affecting abatement of interference to 800 MHz public safety systems. In the *NPRM*, the Commission documented the increasing incidence of interference to 800 MHz band public safety systems from high density ESMR and cellular telephone systems and tentatively concluded that interference to public safety communications systems represented "a sufficiently serious problem that a solution must be found."¹³

6. The release of the *NPRM* resulted in a record of over 2200 filings (both formal comments and reply comments; and an extensive number of *ex parte* presentations) containing engineering, economic, legal and policy analyses. This record, and our own internal analyses, culminated in the *800 MHz R&O*, in which we achieved the four, express, paramount goals we had established:

- a solution that abates "unacceptable interference" caused by ESMR and cellular systems to 800 MHz public safety systems;
- a solution that is both equitable and imposes minimum disruption to the activities of all 800 MHz band users, including public safety, non-cellular SMR, and B/ILT systems;
- a solution that results in responsible spectrum management; and
- a solution that provides additional 800 MHz spectrum that can be quickly accessed by public safety agencies and rapidly integrated into their existing systems.¹⁴

¹⁰ See Avoiding Interference Between Public Safety Wireless Communications Systems and Commercial Wireless Communications Systems at 800 MHz, a Best Practices Guide, December 2000 (*Best Practices Guide*).

¹¹ See generally Promoting Public Safety Communications, Realigning the 800 MHz Land Mobile Radio Band to Rectify Commercial Mobile Radio - Public Safety Interference and Allocate Additional Spectrum to Meet Critical Public Safety Needs, Nextel Communications, Inc, submitted by Robert S. Foosaner, Nextel Communications, Inc., to Thomas J. Sugrue, Chief, Wireless Telecommunications Bureau, FCC (cover letter dated Nov. 12, 2001) (White Paper).

¹² See Letter, from Jerry Jasinowski, President NAM and Clyde Morrow, Sr., President, MRFAC, Inc. to Michael Powell, Chairman, Federal Communications Commission, dated Dec. 21, 2001 (NAM/MRFAC Proposal).

¹³ See Improving Public Safety Communications in the 800 MHz Band; Consolidating the 900 MHz Industrial/Land Transportation and Business Pool Channels, *Notice of Proposed Rulemaking*, WT Docket No. 02-55, 17 FCC Rcd 4873, 4482 ¶ 16 (2002), as modified in *Erratum*, 17 FCC Rcd 7169 (PSPWD 2002) (*NPRM*).

¹⁴ See *800 MHz R&O*, 19 FCC Rcd 14972-73 ¶ 2.

7. Since release of the *800 MHz R&O*, we have received *ex parte* communications and comments responsive to a *Public Notice* issued on October 22, 2004.¹⁵ Our review and analysis of this supplemental record, and our independent review of the *800 MHz R&O*, form the basis for the actions we take herein as we continue to advance our goals in this proceeding.

III. DISCUSSION

A. Nextel's 700 MHz Guard Band Spectrum

8. We reiterate our decision in the *800 MHz R&O* to accept Nextel's surrender of its current 700 MHz Guard Band spectrum rights in forty-two markets.¹⁶ Although we believe it was implicit in the *800 MHz R&O* that Nextel, in relinquishing its Guard Band spectrum would submit the related licenses for cancellation,¹⁷ we have been asked to clarify that this will be the case.¹⁸ Accordingly, we are ordering Nextel to submit its 700 MHz Guard Band licenses for cancellation within thirty days of publication of this *Order* in the Federal Register.¹⁹

B. Nextel's Acknowledgement

9. Paragraph 87 of the *800 MHz R&O* requires Nextel to file an acknowledgment to ensure that "the public is protected against potential claims by Nextel relating to any 800 MHz reconfiguration costs that it chooses to incur."²⁰ Such an acknowledgement must provide, in relevant part, that Nextel shall acknowledge that "it has studied the law and the facts and has made its own estimate of the risks that implementation of the *Order* may be delayed by judicial review and the *Order* may, in fact, be declared invalid" and that "it has accepted the risk of delay and invalidity and that, therefore, it cannot recover its costs or any damages associated with implementation or non-implementation of the *Order* from the Commission or any government entity."²¹ In response to an inquiry from Nextel,²² we clarify that the quoted paragraph specifically means that, in the event a court invalidates the *800 MHz R&O*, Nextel would be barred from bringing a civil action against the government to recover the costs it had incurred up to that point in implementing 800 MHz band reconfiguration, or otherwise seek redress from the government for any claimed injury arising from Nextel's actions taken in connection with the *800 MHz*

¹⁵ See n. 5, *supra*.

¹⁶ See *800 MHz R&O*, 19 FCC Rcd 15080 ¶ 208-209. We correct a typographical error in the *800 MHz R&O* to the effect that Nextel would surrender 700 MHz guard band spectrum in forty markets. See *800 MHz R&O*, 19 FCC Rcd 15009 ¶ 61, 15080 ¶ 208. Our licensing records reveal that Nextel holds 700 MHz Guard Band spectrum in forty-two markets.

¹⁷ See *800 MHz R&O*, 19 FCC Rcd 14977-78 ¶ 12, 15080, ¶¶ 208-209.

¹⁸ See Letter, from Kathleen Wallman, to Marlene Dortch, Secretary, Federal Communications Commission, dated Sep 20, 2004.

¹⁹ Nextel shall return all of its 700 MHz Guard Band licenses to the Commission by filing cancellation requests in the Universal Licensing System (ULS). As noted above, this spectrum will not be available for licensing until the Commission decides through a rulemaking proceeding how it should be licensed.

²⁰ See *800 MHz R&O*, 19 FCC Rcd 15021 ¶ 87.

²¹ *Id.*

²² *Nextel Sep. 23 Ex Parte* at 2.

R&O. It does not mean that, in such instance, that Nextel and the other affected parties, including, without limitation, the Commission, must continue to perform their respective obligations under the *800 MHz R&O*.

C. Letter of Credit

10. In this section, we modify the letter of credit provisions in the *800 MHz R&O* in three respects, as discussed more fully below. First, the letter of credit will serve as a security against default, and will not constitute the corpus of band reconfiguration funds absent a default. Second, we will allow up to ten financial institutions to issue the letter or letters of credit, provided one of such institutions is designated as the agent for all institutions. Third, we will consider waiver of the conflict of interest provisions governing the Trustee, so as to provide a procedural means for allowing the Trustee to have *de minimis* interests which, otherwise could be viewed as a conflict of interest. We make these changes in response to information provided by Nextel and derived from its discussions with entities which may issue the letters of credit, or serve as the Letter of Credit Trustee.²³ In making these changes, we perceive no conflict with our basic objective of ensuring that funds will be available to complete band reconfiguration even in the event of a change in Nextel's financial condition, including bankruptcy.²⁴

1. Background

11. The *800 MHz R&O* requires Nextel to "provide an irrevocable letter of credit securing \$2.5 billion."²⁵ It envisions that the letter of credit "will serve as the funding source for the costs involved in reconfiguring the 800 MHz systems for non-Nextel licensees and possibly as the source of any payment to the United States Treasury."²⁶ The *800 MHz R&O* also provides that "only one financial institution, acceptable to the Commission, issue the letter of credit."²⁷ It also states that the letter of credit "shall specify a [T]rustee, acceptable to the Commission, as the beneficiary, which [trustee] shall administer the funds from the letter of credit and receive the funds from the letter of credit in the event of a Nextel default."²⁸ Among other things, "the Trustee will draw upon the letter of credit those funds necessary to accomplish band reconfiguration."²⁹ The *800 MHz R&O* further provides that "Nextel and the Letter of Credit Trustee shall formalize the terms of their relationship with a written contract and/or trust deed, drafts of which shall be submitted for Commission final review and approval."³⁰ The appendix to the *800 MHz R&O* contains "an outline of key terms [of the contract] envisaged by the Commission,"³¹ including a representation and warranty by the Letter of Credit Trustee (Trustee) that it "meets the qualifications set

²³ See *Nextel Sep. 23 Ex Parte*.

²⁴ *800 MHz R&O*, 19 FCC Rcd 14987 ¶ 30.

²⁵ *Id.* at 15067 ¶ 182, 15121-22 ¶ 325.

²⁶ *Id.*

²⁷ *Id.* at 15067 ¶ 182.

²⁸ *Id.* at 15068 ¶ 184.

²⁹ *Id.* at 15067-68 ¶ 183.

³⁰ *Id.*

³¹ *Id.* at 15068 n.496.

forth in the *Report and Order* (e.g., independence and absence of conflicts of interest.)”³² The *800 MHz R&O* also specifies that “on the occasion of a material breach by Nextel of its obligations hereunder, as declared by the Commission, the [T]rustee shall be entitled to draw on the ... letter of credit as specified in such instrument.”³³

2. Structure of the Letter of Credit

a. Draws to Cover Costs Relating to Each Incumbent Relocation

12. Nextel expressed concern about the cost and administrative burden associated with the procedure set forth in the *800 MHz R&O* governing the use of the letter of credit to directly finance band reconfiguration.³⁴ Nextel asserts that a procedure that would allow it to “pay[] the 800 MHz relocation costs directly as they are incurred during the relocation process, with corresponding periodic reductions in the amount of the [letter of credit]” would be “less costly and burdensome” than the procedure set forth in the *800 MHz R&O*.³⁵ Nextel recommended that the Transition Administrator, in consultation with the Trustee and Nextel, develop procedures that would allow Nextel to pay the 800 MHz incumbent relocation costs directly.³⁶

13. Specifically, Nextel believes that such procedures should include the following:

- Nextel’s obligations to pay an incumbent’s retuning costs would be triggered when Nextel receives a valid invoice for such costs consistent with the terms of the retuning agreement with the incumbent, or, if such costs or invoice are disputed, when the dispute is resolved by the Commission or the appropriate alternative dispute resolution process.
- Nextel should have a commercially reasonable period (*i.e.*, 30 days) after the obligation is triggered to satisfy a payment obligation.
- In the event Nextel fails to satisfy a payment obligation within the required period, the Transition Administrator should notify Nextel that, if it fails to satisfy the payment obligation within ten days of such notice, the letter of credit Trustee will draw on the letter of credit to pay the costs in question.³⁷

³² *Id.*, Appendix E-Annex E, p. 245, bullet 2 & p. 247, bullet 2.

³³ *Id.* at 15068 ¶ 184, 15121-22 ¶ 325.

³⁴ *Id.* at 15073-74 ¶ 198. *See also Nextel Sep. 21 Ex Parte; Nextel Sep. 23 Ex Parte; Nextel Oct. 1 Ex Parte; Nextel Oct. 13 Ex Parte.*

³⁵ Nextel noted that the draw fees alone resulting from the frequent and recurring draws “would likely total in excess of \$2.5 million.” It also argued that “frequent and recurring draws on the [letter of credit] would increase the Trustee’s duties, which likely would result in higher costs charged by the Trustee to compensate it for its increased time and expense.” Finally, it stated that the approach contemplated in the *800 MHz R&O* “would likely result in licensees not being paid as quickly because, after Nextel and the licensee have agreed to the payment amount (or the payment amount has been determined pursuant to the dispute resolution mechanism), the Transition Administrator, the Trustee, and [the letter of credit] fronting banks would each need to coordinate and implement the draw requests before the incumbent licensee could be paid.” *Nextel Oct. 13 Ex Parte* at 1.

³⁶ *Nextel Oct. 13 Ex Parte* at 1.

³⁷ *Id.* at 1-2.

14. The only commenting parties that addressed this issue oppose Nextel's proposed modifications.³⁸ They believe the modifications would provide Nextel a superior negotiating position when negotiating relocation agreements with incumbents.³⁹ Specifically, these parties argue that relegating the letter of credit to a stand-by source of funding permits Nextel to gain concessions from licensees by promising faster, direct payment lower than their true costs.⁴⁰

15. As an initial matter, we disagree that Nextel's payment obligations should be triggered by receipt of an invoice for retuning work. The *800 MHz R&O* contemplates that incumbents will obtain an advance estimate of retuning costs and present that estimate to the Transition Administrator or Nextel. Upon approval of the estimate, funds would be disbursed and the work would commence. Thereafter, an invoice, and the required certifications, would be presented to the Transition Administrator and any upward or downward adjustments would be made.⁴¹ The process apparently contemplated by Nextel would involve reimbursement of reconfiguration costs an incumbent already incurred. We emphasize here that incumbents should incur no costs for band reconfiguration, and that the sole responsibility for paying all band reconfiguration costs—including the cost of preparing the estimate, negotiating the retuning agreement, and resolving any disputes—lies with Nextel.

16. We agree that Nextel should have a commercially reasonable period to satisfy a payment obligation directly. However, given the importance of abating unacceptable interference to public safety systems, and the speed of modern banking and accounting technology, we believe that funds should be provided as soon as practicable, and in no event in more than thirty days. While we recognize that timing of payments may be a factor in relocation negotiations, we believe that incumbent licensees, especially when the Transition Administrator serves as an intermediary, are fully capable of incorporating the time value of money into their negotiation strategies.

17. Accordingly, if Nextel fails to honor a payment obligation within thirty days, the Transition Administrator will consider whether facts or circumstances exist such that it is reasonable for Nextel not to honor the obligation. If ten days after the thirty-day period has run (*i.e.* forty days following the initial payment obligation), the Transition Administrator determines that no good causes existed for Nextel to fail to honor the payment obligation, the Transition Administrator will notify the Letter of Credit Trustee of the amount that Nextel owes and that the Trustee must draw this amount from the letter of credit. The Trustee must draw this amount from the letter of credit within thirty days of this notification (seventy days from the initial payment obligation). We stress that we expect Nextel to honor its payment obligations in a timely fashion and do not anticipate frequent use of the procedures set forth in this paragraph.

18. We note that the Transition Administrator, after receiving Commission concurrence, may direct the Trustee to make periodic (*e.g.*, quarterly) reductions in the letter of credit to account for such direct payments that Nextel may make. The details of both the direct payment and the letter of credit reduction procedures should be set forth in the agreement among Nextel, the Transition Administrator,

³⁸ See Comments of the United Telecom Council, the National Rural Electric Cooperative Association and the American Water Works Association on the Public Notice, filed December 3, 2004 at 7-8.

³⁹ *Id.* at 7.

⁴⁰ *Id.*

⁴¹ See *800 MHz R&O*, 19 FCC Rcd 15074 ¶ 198.

and the Trustee (a draft of which is found at Appendix E-Annex E of the *800 MHz R&O*), the final version of which shall be submitted to the Commission for review and approval.⁴² However in no event shall the value of the Letter of Credit fall below \$850 million. We hereby delegate to the Wireless Telecommunications Bureau, in consultation with the Commission's Office of General Counsel, the authority to conduct such review and approval.

19. In sum, we anticipate that Nextel will, in fact, pay relocation costs directly and that—from the standpoint of securing funds for complete band reconfiguration—this payment procedure will be at least equivalent to having the Trustee draw the funds directly from the letter of credit. However, if Nextel fails to pay a legitimate relocation cost then the Trustee must draw from the letter of credit. We wish to emphasize that this payment process does not affect the thirty-six month deadline for completion of band reconfiguration—a fact that provides Nextel incentive to satisfy its financial obligations in a timely fashion. Finally, we reiterate our statement in the *800 MHz R&O*, that, regardless of the letter of credit provisions herein, Nextel is unconditionally liable for payment of the full cost of band reconfiguration and clearing of the 1.9 GHz spectrum, including BAS relocation.⁴³

b. Multiple Letters of Credit

20. In an *ex parte* presentation, Nextel stated that, “due to the size of the [letter of credit], and based on its discussions with the prospective lenders, it would be difficult, if not impossible, for the LOC to be issued by a single financial institution as contemplated by the R&O.”⁴⁴ Nextel suggested that “the Commission's objectives could be achieved by having one or more letters of credit totaling \$2.5 billion issued by a number of financial institutions, with each institution separately responsible for a proportionate share of the \$2.5 billion LOC amount.”⁴⁵ Nextel subsequently clarified that “it anticipates that no more than ten financial institutions would be issuing such letters of credit.”⁴⁶ Nextel also stated that “the [letter of credit] arrangements could be structured to provide for the designation of a single agent to act on behalf of each of the issuing financial institutions.”⁴⁷ We believe that the changes requested by Nextel can be accommodated consistent with our concern that funds remain available for completion of 800 MHz band reconfiguration independent of the financial condition of Nextel. Accordingly, we will allow up to ten financial institutions to be parties to the credit agreement pursuant to which the letters of credit are issued, so long as: (a) [each such institution meets the qualifications for the issuer of the letter of credit as specified in the 800 MHz R&O](#); (b) [the issuing institutions designate a single agent to act on their behalf](#); and c) [that each such institution is responsible to the trustee](#).

3. Appropriate Qualifications for the Letter of Credit Trustee

21. Nextel has recommended that “the Commission clarify that an entity will be deemed to be

⁴² *Id.* at 15068 ¶ 184.

⁴³ *Id.* at 14977-78 ¶¶ 12-13, 14987 ¶¶ 29-30, 15064-15065 ¶¶ 177-179.

⁴⁴ *Nextel Sep. 23 Ex Parte* at 1.

⁴⁵ *Id.*

⁴⁶ *Nextel Oct. 1 Ex Parte* at 1.

⁴⁷ *Id.*

independent and free of impermissible conflicts of interest, and thus qualified to act as the [t]rustee,”⁴⁸ specified in the *800 MHz R&O*, subject to the following conditions:

- it is an entity that would be eligible under the Trust Indenture Act of 1939, 15 U.S.C. §§ 77aaa, *et. seq.*, to act as an indenture trustee for the debt obligations of Nextel or its subsidiaries;
- the engagement of such an entity to act as Trustee would not constitute a “related party transaction” of Nextel of the type required to be disclosed pursuant to SEC Regulation SK, Item 404;
- the entity does not, directly or through its affiliates, hold for its or such affiliates’ account, debt obligations of Nextel and its subsidiaries that total in the aggregate more than 1% of the total consolidated debt obligations of Nextel and its subsidiaries;
- the entity is not, directly or through its affiliates, an issuer of the [letter of credit] required under the *800 MHz R&O*; and
- the entity has a combined capital and surplus of at least \$50 million.⁴⁹

Subsequently, Nextel stated it would “support a process under which Nextel and the proposed Trustee would be required to disclose to the Commission any potential conflicts of interest, with the Commission then determining whether such potential conflicts are disqualifying under the [above recommended] criteria.”⁵⁰

22. We agree that an entity meeting the conditions described above could, depending on circumstances, satisfy the *800 MHz R&O*’s requirement that the Trustee be independent and free from conflicts of interest.⁵¹ We require, however, that Nextel and such a proposed Trustee fully disclose any apparent conflict of interest, whether now existing, or arising in the future. Said disclosure must be accompanied by a request for waiver documenting that the potential conflict of interest will not affect the Trustee’s independence and that the Trustee will remain independent throughout the band reconfiguration process. We hereby delegate to the Chief of the Wireless Telecommunications Bureau, in consultation with the Commission’s Office of General Counsel, the authority to dispose of such waiver request. Upon denial of said waiver, a substitute Trustee, satisfactory to the Commission, must be nominated, by Nextel, in the shortest practical time.

⁴⁸ *Nextel Sept 23 Ex Parte* at 2.

⁴⁹ *Id.*

⁵⁰ *Nextel Oct. 13 Ex Parte* at 2.

⁵¹ The text of the *800 MHz R&O* did not explain this requirement. As noted above, however, the appendix to the *800 MHz R&O* at Appendix E-Annex E, p. 245, bullet 2 & p. 247, bullet 2, contains an outline of key terms including a representation and warranty by the Trustee that it “meets the qualifications set forth in the *800 MHz R&O* (e.g., independence and absence of conflicts of interest).” [We note that the discussion here relates to the independence and absence of conflicts aspects of the trustee's qualifications. The conditions set forth above do not necessarily bear on whether the trustee is qualified in other respects.](#)

4. Other Circumstances Under Which Letter of Credit Trustee Could Draw Funds

23. Nextel seeks clarification of the statement in the *800 MHz R&O* that “[o]n the occasion of a material breach by Nextel of its obligations hereunder, as declared by the Commission, [the] Trustee shall be entitled to draw on the letter of credit as specified in such instrument.”⁵² Nextel requests that the provision be “clarified” to state that “the Trustee will be empowered to draw on the [letter of credit] only in instances in which Nextel fails to pay required incumbent retuning costs . . . or in the event of a material breach of Nextel’s financial obligations in carrying out 800 MHz band reconfiguration, *i.e.*, if Nextel (1) files for bankruptcy protection, or (2) fails to make a payment to the U.S. Treasury within 30 days of the issuance of the Public Notice as described in paragraph 330 of the [*Order*].”⁵³ Nextel also requests that it “have 30 days to cure any such apparent breach before the Trustee is empowered to draw on the [letter of credit].”⁵⁴ We decline to limit the definition of “material breach” in the manner which Nextel suggests.

5. Reversion of Letter of Credit Funds

24. In its *ex parte*, Nextel requests that the Commission confirm Nextel’s understanding that it will be able to “terminate the [letter of credit], and receive any funds remaining in the [letter of credit] trust account, after band reconfiguration is complete and after the financial reconciliation process set forth in the *R&O* is complete (including any payments to the U.S. Treasury).”⁵⁵ Specifically, Nextel asks us to clarify that if Nextel fails to make any of the payment owed to the Treasury by the date specified in the *800 MHz R&O* and the corpus of the letter of credit trust(s) becomes forfeit to the United States Treasury, the amount of any such forfeiture shall not exceed the amount owed to the United States Treasury by Nextel and any remaining amounts after such forfeiture shall be paid to Nextel.⁵⁶

25. We believe that the reversion of the Letter of Credit funds to Nextel, in the circumstances described was implicit in the *800 MHz R&O*. However, we hereby clarify that if Nextel fails to make any of the payment owed to the Treasury by the date specified in the *800 MHz R&O* and the corpus of the letter of credit trust(s) becomes forfeit to the United States Treasury, the amount of any such forfeiture shall consist of the corpus of the trust(s), less the “Overage.” We define “Overage” as any portion of the corpus of the trust(s) that (a) remains after the 800 MHz relocation is complete, and (b) exceeds the aforementioned payments owed to the Treasury. Once any Overage has been determined, the letter(s) of credit may be terminated by Nextel, but only after the Treasury has received the forfeited funds referenced herein.

26. However, we also take this opportunity to make it clear that all of Nextel’s obligations hereunder are not limited to the sums available from the Letter of Credit. For example, if the corpus of the Letter of Credit were somehow inadequate to fund payment of Nextel’s obligations to the Treasury, Nextel would nonetheless remain liable for the full amount due to the Treasury. We also reiterate our decision in the *800 MHz R&O* that in the event that the requisite border area agreements are not reached

⁵² *Nextel Oct. 13 Ex Parte* at 2, citing *800 MHz R&O*, 19 FCC Rcd 15068 ¶ 184.

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Nextel Oct. 13 Ex Parte* at 2.

⁵⁶ *Id.*

within thirty-six months of the release date of the Public Notice announcing the start of reconfiguration of the first NPSPAC Region, Nextel shall elect to extend the life of the Letter of Credit or secure a separate Letter of Credit for a sum of money equal to that which would have been incurred had the Commission band plan been implemented along the borders without regard to international agreements.⁵⁷

D. Letter of Cooperation from Affiliates

27. In the *800 MHz R&O*, we require Nextel to obtain commitments to cooperate in band reconfiguration from entities that are “connected in any way” to Nextel.⁵⁸ Our intent in requiring such a commitment was to foreclose the possibility that entities such as Nextel Partners, Inc., a subsidiary of Nextel could disclaim responsibility for retuning its systems to implement band reconfiguration.⁵⁹ However, the term “connected” may be overly expansive in this context and arguably could be construed to include, *e.g.*, independent companies with which Nextel has “roaming agreements” but no ownership interest or control.⁶⁰ We now clarify that we did not intend such an expansive definition but rather desired Nextel or its successors or assigns to provide the Commission with letters demonstrating commitments from its corporate partners, subsidiaries, or affiliates (including any 800 MHz system operators in which Nextel has an ownership interest).⁶¹

E. Calculation of Credit for 800 MHz Spectrum Relinquished by Nextel

28. The *800 MHz R&O* contains a detailed set of calculations, to be applied at the conclusion of band reconfiguration, to determine whether the combination of (1) costs incurred by Nextel during band reconfiguration, and (2) the value of 800 MHz spectrum surrendered by Nextel, are equal to the value of the 1.9 GHz spectrum rights that Nextel will receive. The order provides that if the combined credits and offsets are less than the value of the 1.9 GHz spectrum, Nextel will pay the difference in the form of a “true-up” payment to the United States Treasury.⁶² Thereby, the public achieves the benefits of band reconfiguration without forfeiting a disproportionate amount of the value of the 1.9 GHz spectrum. In formulating these calculations, it was necessary for us to assess the amount of 800 MHz spectrum currently held by Nextel and the value thereof. In the *800 MHz R&O*, the Commission assigned a cumulative value of \$1.607 billion to the General Category (GX), interleaved, and contiguous 800 MHz spectrum below 817/862 MHz being given up by Nextel.⁶³ While Nextel does not challenge the Commission’s methodology, in *ex parte* filings submitted to the Commission, Nextel contends that the Commission underestimated the actual MHz-population coverage of Nextel’s spectrum, and that the resulting \$1.607 billion figure is therefore too low.⁶⁴

⁵⁷ See *800 MHz R&O*, 19 FCC Rcd 15064 n.471.

⁵⁸ See *800 MHz R&O*, 19 FCC Rcd 15121-22 ¶ 325.

⁵⁹ See, *e.g.*, *Aug. 19 Nextel Ex Parte* at 1; *Sep. 16 Nextel Ex Parte* at 1; *Sep. 23 Nextel Ex Parte* at 2.

⁶⁰ Roaming agreements are agreements between wireless carriers that allow one company’s subscribers to use their phones on the other wireless carrier’s network.

⁶¹ *E.g.*, Nextel Partners and Nextel International.

⁶² See *800 MHz R&O*, 19 FCC Rcd 15118-209 ¶¶ 318-322.

⁶³ *Id.* at 15118-209 ¶¶ 318-322.

⁶⁴ See generally *Sep. 21st Nextel Ex Parte*.

29. In the *800 MHz R&O*, the Commission determined the MHz-pops value of 800 MHz spectrum based on the available information presented in the record on this issue, as well as information in its licensing database.⁶⁵ To determine the amount (in megahertz) of GX and interleaved spectrum to be credited to Nextel, the Commission reviewed Nextel's 800 MHz license holdings in eleven major markets, and derived an average bandwidth figure from this market sample.⁶⁶ The Commission then multiplied each bandwidth figure by 234 million in population, which was the population coverage figure for Nextel's spectrum provided in the Kane-Reece valuation report submitted by Verizon.⁶⁷ Although Nextel contended that its 800 MHz spectrum provided full nationwide population coverage, the Commission concluded that multiplying the average bandwidth figures by a nationwide population figure would yield an inflated MHz-pop calculation because this did not sufficiently account for the presence of non-Nextel incumbents on GX and interleaved spectrum. The Commission, therefore, used the lesser Kane-Reece population figure, which was the only other available figure in the record.

30. In an August 30, 2004 *ex parte* filing, Nextel contended that its GX and interleaved license holdings covered virtually the entire nationwide population, and that the Commission should therefore have used a nationwide population figure of approximately 286 million rather than 234 million in its calculation, without changing the bandwidth or any other variable in the valuation formula. Based on this approach, Nextel initially proposed that the \$1.607 billion credit for 800 MHz spectrum be increased by \$738 million to a total of \$2.345 billion. In a subsequent *ex parte* filing dated September 21, 2004, however, Nextel lowered its proposed credit adjustment based on a far more granular market-by-market analysis of 800 MHz spectrum held by Nextel and its affiliate, Nextel Partners.⁶⁸

31. In its analysis, Nextel individually surveyed its licensed 800 MHz spectrum holdings in each of 3,219 U.S. counties, plus incorporated cities not included in a county. For each market, Nextel then took the population of the market, based on 2000 Census data, and calculated the specific number of usable GX, interleaved SMR, interleaved Business and I/LT, and 800 MHz contiguous channels held by Nextel or by Nextel Partners that covered the market.⁶⁹ Using this data, Nextel derived a revised set of MHz-pops figures for each spectrum category, and then applied to the MHz-pop figures for each category

⁶⁵ See *800 MHz R&O*, 19 FCC Rcd 15115-21 ¶¶ 307-323.

⁶⁶ The megahertz amount derived for the GX band was 5.12 megahertz, and the megahertz amount for the interleaved bands was 3.76 megahertz. See *800 MHz R&O*, 19 FCC Rcd 15119-20 ¶¶ 319, 322.

⁶⁷ The Commission multiplied the MHz-pop figure for the GX band (5.12 megahertz x 234 million pops) by \$1.70, which was the baseline MHz-pop value derived for both 1.9 GHz and 800 MHz spectrum. For the interleaved spectrum, the Commission multiplied the MHz-pop figure (3.76 megahertz x 234 million pops) by \$1.49, which was the discounted value used based on the interleaved nature of the band.

⁶⁸ *Sep. 21st Nextel Ex Parte* at 2-3.

⁶⁹ To determine the number of usable licensed channels in a market, Nextel assumed the presence of a hypothetical cell at the population center indicated by U.S. Census data for that market, subject to Part 90 co-channel short-spacing rules and incumbent protection requirements. The operating parameters of that cell were assumed to be typical for an iDEN base station, i.e., (1) ground elevation using thirty meter resolution terrain data; (2) antenna height of sixty feet above ground; and (3) effective radiated power of fifty watts using an omni-directional antenna. If the 22 dBµV/M contour of the model cell fit within Nextel/Nextel Partners' existing footprint for the subject channel (i.e., the model cell's contour would not extend beyond the composite 22 dBµV/M footprint of Nextel/Nextel Partners' EA licenses and individual site licenses), then the subject channel was deemed "usable" and counted towards Nextel's bandwidth figure for that market.

the MHz-pops formulas that were used in the *800 MHz R&O* (i.e., \$1.70 per MHz-pop for contiguous and GX spectrum, \$1.49 per MHz-pop for interleaved spectrum), yielding the results in the table below:

	<u>MHz</u>	<u>POPs</u>	<u>Value MHz POP</u>	<u>Actual Value</u>
NPSPAC Spectrum	6.00	285,620,445	\$ 1.70	\$2,913,328,539
Restricted Use	(0.5)	285,620,445	\$ 1.70	(\$242,777,378)
Guard Band	<u>(2.00)</u>	<u>247,051,622</u>	<u>\$ 1.70</u>	<u>(\$839,975,515)</u>
Nextel Upper Channel Gain	3.50			1,831,000,000
General Category	(4.51)	285,620,445	\$ 1.70	(\$2,188,000,000)
SMR Interleaved	(2.96)	285,620,445	\$ 1.49	(\$1,258,000,000)
B/ILT Interleaved	<u>(1.04)</u>	<u>285,620,445</u>	<u>\$ 1.49</u>	<u>(\$444,000,000)</u>
Total Nextel Loss	(5.01)			(\$2,059,000,000)

Based on the above analysis, Nextel proposed that its credit for 800 MHz spectrum be increased by \$452 million rather than the \$738 million originally requested, for a total credit of \$2.059 billion.

32. We have carefully reviewed the Nextel analysis and the comments that parties have filed in response to that analysis. We conclude that the data submitted by Nextel provides credible support for its contentions with respect to the amount and value of 800 MHz spectrum that it will relinquish under the terms of the *800 MHz R&O*. Significantly, Nextel does not challenge the basic valuation approach used in that order, but has provided more comprehensive and detailed data regarding its spectrum holdings for use under the Commission's approach. Nextel has based its calculations on an analysis of all markets, rather than a sampling of markets. Nextel has also provided more complete information on Nextel's interleaved spectrum holdings by including data on interleaved non-SMR (B/ILT) channels held by Nextel, which were not taken into account in our valuation in the *800 MHz R&O*. In addition, Nextel's bandwidth calculations more accurately reflect the variations in Nextel's spectrum holdings from one market to another, and do not count spectrum that is unavailable to Nextel because of the presence of non-Nextel incumbents.

33. We believe it is in the public interest to base our valuation on the granular data provided by Nextel, rather than on the less precise information available to us at the time of the *800 MHz R&O*. Indeed, we note that Nextel's revised analysis does not always work in its favor. For example, it results in a lower value for some spectrum categories (816-817/861-862 MHz contiguous spectrum, interleaved SMR channels) than Nextel was credited for in the *800 MHz R&O*, while the offsetting valuation of other categories (GX channels, interleaved non-SMR channels) is higher.

34. We believe no commenting party has shown material errors in the Nextel analysis. For instance, we disagree with those parties who claim it is unclear how Nextel determined where particular

channels are available and usable.⁷⁰ We believe Nextel clearly described the methodology they used to determine whether channels were usable based on compliance with all Part 90 co-channel short-spacing requirements.⁷¹ Our incorporation of the granular Nextel data into the valuation methodology set out in the *800 MHz R&O* yielded results consistent with those derived by Nextel. In addition, we disagree with parties who claim that Nextel should have submitted their data before the Commission reached a decision on this matter.⁷² Although Nextel's initial data on its spectrum holdings was not completely supported and documented, we observe that Nextel could not forecast the exact level of detail required because they were unaware of the valuation methodology the Commission would employ.

35. Nextel concedes that its analysis does not take border area channel restrictions into account. However, Nextel contends that even if this results in some overestimation of the amount of usable spectrum it is giving up in the border areas, this is offset by the fact that, in the border areas, Nextel will not receive the full six megahertz of spectrum currently assigned to the NPSPAC channels, even though it has been credited with this gain nationwide for purposes of the valuation analysis.⁷³ We agree that any overestimation of Nextel's border area spectrum is offset by the lesser amount of spectrum Nextel will receive in those areas, so that variations in border area coverage and bandwidth do not materially affect our valuation analysis.

36. Based on this revised information, we conclude that the "credit" that Nextel should receive for surrender of 800 MHz spectrum should be increased by \$452 million.⁷⁴ Accordingly, in the post-rebanning calculation used to determine whether Nextel must make a "true-up" payment to the United States Treasury, Nextel will be credited the sum of \$2.059 billion for its surrendered 800 MHz spectrum.

F. Interference Mitigation

1. Signal Strength Threshold for Interference Protection

37. In the *800 MHz R&O*, we specified that public safety, CII, and other non-cellular 800 MHz systems must receive at least a minimum measured input signal power of -101 dBm for portable (*i.e.*, hand-held) units and -104 dBm for vehicular (mobile) units in order to be eligible for protection from interference in the 806-816.35 MHz/851-861.35 MHz band segment.⁷⁵ We chose these values by balancing the reference sensitivity of 800 MHz receivers (typically on the order of -116 to -119 dBm) with the desire not to impose an excessive burden on ESMR and cellular telephone carriers to protect an extremely weak signal.⁷⁶ We imposed these signal strength threshold protection levels in the knowledge that such levels could be burdensome before band reconfiguration was completed, and that the Consensus

⁷⁰ Comments of Cingular Wireless LLC, filed December 2, 2004 at 5 (*Cingular Comments*).

⁷¹ See *e.g.*, *Sep. 21st Nextel Ex Parte* at 4.

⁷² *Cingular Comments* at 5-6.

⁷³ For example, in Canadian Region 2, Nextel may receive as little as 1.79 megahertz of spectrum in the current NPSPAC band, far less than the six megahertz of such spectrum it will receive in other parts of the country upon completion of band reconfiguration. *Sep. 21st Nextel Ex Parte* at 4.

⁷⁴ *Sep. 21st Nextel Ex Parte* at 3.

⁷⁵ See *800 MHz R&O*, 19 FCC Rcd 15029-30 ¶¶ 105-107.

⁷⁶ *Id.* at 15029 ¶ 105.

Parties intended these levels to go into effect only after reconfiguration of the 800 MHz band.⁷⁷ However, we chose to implement them immediately because there was nothing in the record, at the time, that would have merited our imposing different interference protection thresholds until the completion of band reconfiguration. The alternative—no interference protection whatsoever until band reconfiguration was complete—was unacceptable given the threat to life and property posed by unacceptable interference to public safety communications.

38. Recently, we have been presented with data: (a) showing that the thresholds established in the 800 MHz R&O could impose substantial operational restrictions on ESMR carriers operating in the interleaved channels prior to completion of band reconfiguration,⁷⁸ and (b) that field experience has shown that a lesser standard will provide less complete—but still meaningful—interference relief while band reconfiguration is being completed.⁷⁹ We therefore waive Sections 22.970(a) and 90.672(a) of our Rules⁸⁰ until band reconfiguration is complete in a particular NPSAC region.⁸¹ Once the Transition Administrator has certified reconfiguration is complete in a region or regions the Commission will release a *Public Notice* announcing that the interim interference protection thresholds permitted under this waiver no longer apply for operations in those regions. Should Nextel decide not to file the acceptance letter required in the 800 MHz R&O, the -101/-104 dBm interference protection thresholds set forth in sections 20.970(a) and 90.672(a) of the Commission's rules will remain in force.⁸²

39. Under the “interim standards” waiver, non-cellular systems meeting a -85 dBm (portable) or -88 dBm (mobile) signal strength threshold will enjoy the full protection measures adopted in the 800 MHz R&O.⁸³ These interim levels, proposed by Nextel, are supported by several commercial, private and

⁷⁷ The Consensus Parties are proponents of a proposal whose essential elements underpinned significant aspects of the 800 MHz R&O. *Id.* at 14974 n.13.

⁷⁸ See *Interference Standard Ex Parte* at 1-5, *APCO Ex Parte*; Comments of Shulman, Rogers, Grandal, Pordy & Ecker, P.A., at 3-4, filed Nov. 8, 2004 (*Shulman Rogers Comments*).

⁷⁹ See *Interference Standard Ex Parte* at 5.

⁸⁰ 47 C.F.R. §§ 22.970(a), 90.672(a).

⁸¹ We recognize the concern raised by the Arizona Public Service Company (Arizona) that “holdouts” in a particular NPSAC region may hinder the completion of rebanding in a region, thus delaying the transition to the final interference protection plan. See Comments of Arizona Public Service Company, filed Nov. 24, 2004 (*Arizona Comments*) at 1. However, Arizona's solution—transition to full interference protection values should occur when reconfiguration in a particular NPSAC region is “essentially complete”—places the Commission with the need to determine, on a case-by-case basis, what constitutes “substantially complete” in the context of each NPSAC region. Moreover, we cannot envision a situation in which we would declare rebanding of a particular NPSAC region “substantially complete” if an ESMR or major CMRS provider, which could be the major interfering party in a region, had not been reconfigured.

⁸² See 800 MHz R&O, 19 FCC Rcd 15129 ¶ 344; 47 C.F.R. §§ 20.970(a), 90.672(a).

⁸³ See 800 MHz R&O, 19 FCC Rcd 15029-30 ¶ 105-107; See *Interference Standard Ex Parte* at 3-4. Licensees using Class A receivers must have a minimum on-street signal level of -85 dBm for portable units and -88 dBm for mobile units in the area experiencing interference. Interim interference protection for licensees using non-Class A receivers will be adjusted based upon the receivers' performance specifications. For example, if a Class B receiver has an intermodulation rejection specification of 5 dB less than a Class A receiver, its protection threshold would be adjusted to -80 dBm. *Id.*

public safety members of the 800 MHz community.⁸⁴ However, support for these interim standards was not universal. Several parties opposed delaying the implementation of the full abatement standards until completion of band reconfiguration in a given NPSPAC region. The Public Safety Improvement Coalition (*PSIC*) argues that these interim standards contravene the Commission's decision to provide immediate relief to public safety systems experiencing unacceptable interference by requiring stations with weaker signal strength to accept interference for up to three years.⁸⁵ The Tri-state Radio Planning Committee (*Tri-State*) believes that the original standards protect the integrity of commercial networks while requiring public safety systems to accept protection levels below those necessary to achieve a minimum mean signal level (50% reliability).⁸⁶ Moreover, Tri-State argues that these interim standards should not apply to systems operating in the NPSPAC channels because these channels are not interleaved.⁸⁷ The Industrial Telecommunications Association, Inc., (*ITA*) argues that, because these interim standards only mandate the use of Best Practices for receivers that do not meet a set signal strength standard, our actions would represent a step backwards because licensees currently apply Best Practices solutions on a voluntary basis for all systems, regardless of technical parameters.⁸⁸

40. As an initial matter, we note that the interim interference protection thresholds correspond approximately to the 50 dB μ V/M minimum signal contour recommended by the Telecommunications Industries Association (TIA) TR-8 Subcommittee for public safety systems operating in urban environments where interference is more likely to occur than in "quieter" suburban or rural areas.⁸⁹ TIA asserts that a 50 dB μ V/M or stronger signal field makes intermodulation interference less likely and facilitates building penetration.⁹⁰ Further, we have reviewed Nextel's comments on the effect the interim interference thresholds would have on certain randomly selected locations and on the Denver, Colorado, public safety system, wherein, Nextel claims, these threshold levels were met at thirty-nine of forty randomly selected locations at which interference was reported.⁹¹ The Nextel information would have been more useful had Nextel provided the underlying data and the methodology used to reach that conclusion. For example, Nextel neither identified the "randomly selected" locations nor stated what public safety systems were involved or whether their conclusions rested on a single point measurement or a group of measurements that were reduced to a mean, median or other statistical value. Accordingly, because of the lack of such information, we have been unable to replicate the Nextel analysis, and

⁸⁴ Letter from Chris Guttman-McCabe, CTIA-the Wireless Association (CTIA) to Marlene H. Dortch, Secretary, FCC at 5 (filed Oct. 13, 2004) (*CTIA Ex Parte*); *APCO Ex Parte*; *Shulman Rogers Comments* at 3-4.

⁸⁵ See Comments of the Public Safety Improvement Coalition, filed Dec. 2, 2004 at 2-4 (*PSIC Comments*) citing *800 MHz R&O*, 19 FCC Rcd 15028 ¶ 102.

⁸⁶ See Letter, dated Dec. 2, 2004, from Peter W. Meade, Chairman, [800 MHz NPSPAC] Region 8 to Marlene Dortch, Secretary, Federal Communications Commission at 1-2 (*Tri-State Radio Comments*).

⁸⁷ *Id.*

⁸⁸ See Comments of Industrial Telecommunications Association, Inc., at 7, filed Dec. 2, 2004 (*ITA Comments*).

⁸⁹ See Comments of the Telecommunications Industry Association, filed May 6, 2002 at 3-4. See also TIA 50 dBu Contour Recommendation, TR-8.18/02-08-00 19, (April 1, 2001).

⁹⁰ *Id.*

⁹¹ *Interference Standard Ex Parte* at 5.

therefore can give little weight to the Nextel claim that interference would be mitigated “for between 86% and 92% of these locations . . .”⁹² Similarly, Nextel has not provided the underlying data for its claim that the interim signal threshold would be exceeded at thirty-nine of the forty locations where interference to the Denver, Colorado public safety system has been reported.⁹³ Nextel has not provided data on whether its conclusions rest on a single data point measurement, or a mean, median or other statistical value applied to a group of measurements. If Nextel was relying on the Denver interference study conducted by Pericle Communications Company⁹⁴—the only such study in the record—we observe that study included literally hundreds of data points and that Nextel did not identify the data points used. We also note the comments of Tri-State that we should not disturb the conclusion in the 800 MHz R&O that the -101 dBm / -104 dBm thresholds should go into effect immediately and that those levels would provide only 50% reliability.⁹⁵ It is unclear from the Tri-State filing whether Tri-State attributes the 50% reliability figure to the fact that the -101 dBm / -104 dBm levels are relatively weak and near the noise floor; or whether their point is that interference would reduce reliability to 50% when the received signal power is as low as -101 dBm / -104 dBm. In any event, Tri-State has not shown how it derived the 50% figure and we thus are not able to factor it into our analysis of Nextel’s proposed interim threshold received signal power levels. We do note that APCO, an active participant in this proceeding from the outset, believes the interim levels are satisfactory.⁹⁶

41. There is a direct relationship between the threshold levels chosen for interference protection and the ability of ESMR and cellular carriers adequately to serve their subscribers—a factor that affects both the public’s access to wireless service and the viability of the carriers’ business. We are not prepared to say that the -85 dBm / -88 dBm interim values strike an exact balance between these competing interests. However, they do appear within the range of reason. Accordingly, as noted in ¶ 38, *supra*, we are waiving the provisions of Sections 22.970(a) and 90.672(a) of our Rules until band reconfiguration is complete in a given NPSPAC region. We note that parties are free to contest our decision and persuade us that data show otherwise.⁹⁷ We observe, in that regard, that claims that the interim values are invalid would be given little weight unless accompanied by the data and methodology underlying those claims.

42. Moreover, we do not believe that the interim levels, alone, will provide sufficient interference protection for public safety communications. Therefore, we caution CMRS licensees that they must exercise the utmost diligence in addressing reports of interference even in cases in which the interim levels are not met. As noted in the *800 MHz R&O*, unacceptable interference can be addressed using Enhanced Best Practices and, when necessary, providing public safety licensees with such additional equipment as may be necessary to address an interference problem.⁹⁸ We note that the interim threshold

⁹² *Id* at 5.

⁹³ *Id*.

⁹⁴ See, e.g., *ex parte* comments, dated June 10, 2003, from City and County of Denver (Denver June 10 *Ex Parte*).

⁹⁵ *Tri-State Radio Comments* at 1.

⁹⁶ See *APCO Ex Parte*.

⁹⁷ See 47 C.F.R. § 1.106 (Petitions for Reconsideration).

⁹⁸ See *800 MHz R&O*, 19 FCC Rcd 14035 ¶ 118.

values correlate closely with the TIA recommendations, *supra*; and our independent review of received power levels contained in the record does not show that the interim values are inherently unreasonable. However, we are concerned that the interim values, even when supplemented by Enhanced Best Practices, may compromise some public safety systems. Both the CMRS operators and public safety officials should be vigilant that unacceptable interference does not occur on channels that are used for mission critical applications, *e.g.*, tactical channels, which may have to be shifted to another frequency to ensure adequate reliability. Thus, we accept the interim values with some reluctance, but recognize that they will apply only until band reconfiguration is completed in each NPSPAC region, and because no party has shown that the values chosen—in combination with Enhanced Best Practices—will result in widespread unacceptable interference. Moreover, we adopt, and incorporate into the waiver, *supra*, the following provisions patterned after Nextel's recommendation for protection of public safety systems that do not meet the interim threshold values, but do meet the threshold values contained in the rules.⁹⁹

- CMRS carriers must mitigate unacceptable interference on public safety control channels (up to four channels) such that the public safety receiver maintains a minimum C/(I+N) of 17dB;
- CMRS carriers must exercise best efforts to mitigate CMRS/public safety interference on the public safety system's voice channels using interference mitigation measures such as those set out in the *Best Practices Guide* so that the public safety receiver maintains a minimum C/I+N of 17dB;¹⁰⁰ and
- If the CMRS carrier(s) are unable to mitigate interference to a public safety system's voice channels, CMRS carriers must provide a report to the public safety licensee demonstrating why mitigation is not practicable in the specific circumstance, even after application of Enhanced Best Practices, including modification or replacement of public safety equipment. After receipt of the report, if the public safety licensee determines that it expects serious system degradation, it may request the Transition Administrator to facilitate mandatory mediation between the parties to obtain relief. If such mediation is unsuccessful, the public safety licensee may seek relief from the Public Safety and Critical Industry Division of the Wireless Telecommunications Bureau. The public safety licensee must serve its request on all relevant CMRS carriers.

43. Although we continue to recognize the importance that CII systems play in the protection of life, health and property, as well as their growing role in Homeland Security, we decline to extend these additional protections to CII licensees because these licensees generally have greater access to funds sufficient to improve signal strength than public safety entities which operate on an appropriated funds basis.¹⁰¹ We also decline to exempt NPSPAC licensees from these interim signal thresholds because until the NPSPAC channels relocate to the lower portion of the 800 MHz band, their systems will still be subject to the possibility of intermodulation interference from ESMR and cellular carriers.

⁹⁹ *Interference Standard Ex Parte* at 3-4. We recognize that this would delay full interference protection for these licensees (*see PSIC Comments* at 2-4) but note that even during this interim period these licensees will enjoy a less interference prone environment. *See* para. 44 *infra*.

¹⁰⁰ *See Best Practices Guide passim*.

¹⁰¹ *See e.g.*, Comments of Entergy Corporation and Entergy Services, Inc., at 5 filed Dec. 2, 2004 (*Entergy Comments*); Comments of Cinergy Services, Inc. and Consumers Energy Company, at 5-6 filed Dec. 2, 2004 (*Cinergy Comments*).

44. We disagree with those parties who argue that the interim interference mitigation thresholds would extend the interference problems in the 800 MHz band for years.¹⁰² The initial phase of band reconfiguration, in which Nextel vacates its spectrum in the interleaved channels and moves General Category incumbents (excepting SouthernLINC) into that vacated spectrum will provide immediate, albeit limited, spectral separation between incompatible technologies, thus providing some decrease in the potential for interference.

45. Even as we set out these interim interference mitigation measures, we continue to afford ESMR and cellular carriers a certain degree of flexibility in resolving interference incidents. We note that the burden for resolving interference is shared not only among ESMR and cellular carriers but also with public safety and that all parties to an interference incident are under a good faith obligation to cooperate. Thus, public safety and CII licensees may make reasonable concessions in the interest of resolving interference if the interference does not compromise safety of life, health and property. Private wireless licensees, such as B/ILT and traditional high site SMR operators, may reach mutual agreements with ESMR and cellular carriers at variance with the foregoing interference provisions until such time as band reconfiguration is complete in a given NPSPAC region.

2. Interference Resolution Procedures

46. In the *800 MHz R&O*, we adopted procedural requirements to expedite the resolution of interference incidents.¹⁰³ Many of these requirements focused on the good-faith obligations of all the parties, including ESMR licensees and cellular operators, in resolving interference. For example, we require ESMR and cellular carriers to respond within twenty-four hours when a public safety licensee reports interference and to perform an interference analysis within forty-eight hours of receipt of such notification.¹⁰⁴ However, we recently have been asked to require licensees making these notifications to include the following system information with their notification:

- receiver make and model number,
- minimum measured input signal power, and
- verification that the affected receiver meets the minimum performance requirements identified in Sections 22.970(b) and 90.672 of the Commission's rules.¹⁰⁵

47. This advance information is purportedly essential to enable cellular and ESMR licensees to begin an immediate assessment of the nature and scope of the interference and possible abatement efforts and actions.¹⁰⁶ We disagree. The only initial obligation of the interfered-with party pursuant to the *800 MHz R&O* is to report, to a single source for receiving interference reports, the location of interference, the time it occurs, a description of kind and severity of interference, the source (if known), the licensee's

¹⁰² See *Cinergy Comments* at 5-8; *Entergy Comments* at 4; *ITA Comments* at 7.

¹⁰³ See *800 MHz R&O*, 19 FCC Rcd 15041-45 ¶¶ 132-141.

¹⁰⁴ *Id.* at 15043 ¶ 136.

¹⁰⁵ See *CTIA Ex Parte* at 2. See also 47 C.F.R. §§ 22.970, 90.672.

¹⁰⁶ See *CTIA Ex Parte* at 2.

licensing information and where it can be contacted.¹⁰⁷ It may not be burdensome for the interfered-with party to report the receiver(s)' make and model number. However, the measurement of received signal power and verification of performance characteristics are substantial efforts that may create an unacceptable burden on the affected public safety or other "high-site" licensee. Nothing we said in the *800 MHz R&O* can be construed to place the exclusive burden of measuring signal power or receiver performance on the party experiencing unacceptable interference. Indeed, particularly with respect to public safety licensees, the interfered-with party may lack the equipment necessary to make such measurements and the expertise to use it. Accordingly, we clarify here that it is the party or parties to which an interference report is addressed, that must conduct received power measurements or receiver performance measurements, when necessary to resolve an interference incident; and that the interfered-with party is required to cooperate with the involved CMRS licensee(s) in providing such other information and assistance as may be reasonably necessary to assist the CMRS licensee(s) in identifying and abating unacceptable interference. In sum, we will not burden interfered-with parties with information collection requirements as a prerequisite to abating interference to what oftentimes are mission critical communications.

48. However, in response to a request from CTIA, we will extend from thirty days to sixty days (after the effective date of the rules), the deadline established in Sections 22.972(a)(2) and 90.674(a)(2) for cellular and ESMR carriers to establish a common, unified electronic means for initial notification of interference incidents.¹⁰⁸ We believe this extension will allow the industry time to develop a single interface, as well as create standard processes and protocols for response, including initial meetings, testing, and documentation.

49. We acknowledge that a case could arise in which a CMRS licensee simultaneously receives a multitude of interference notices, such that the volume prevents a timely response to all such notices. Although we do not foresee that the circumstance would arise often, relief could be made available through the waiver process. We would expect waiver requests to meet the Commission's waiver standard, contain detailed factual support and a projected time when the carrier can respond to, analyze, and abate the objectionable interference.¹⁰⁹ While the waiver request is pending, however, the relevant CMRS licensee(s) must take all reasonable steps to respond to interference incidents as quickly as possible. We delegate to the Wireless Telecommunications Bureau, the authority to act on such waiver requests. We reiterate, however, that if a cell site (or cell sites) is implicated in a dramatic spike in interference incidents that threaten the safety of life, health, and property, we may require these cell site operator(s) to cease operations until the interference problem is resolved.¹¹⁰

50. In the *800 MHz R&O* we stated that all parties involved in an interference incident, including public safety and CII licensees, are under an affirmative duty to act in good faith in resolving an interference dispute.¹¹¹ These good faith requirements include, without limitation, the obligation to timely meet appointments and provide whatever technical assistance is appropriate under the circumstances. We will neither hesitate to act when the obligation of good faith is breached nor sanction

¹⁰⁷ See *800 MHz R&O*, 19 FCC Rcd 15045 ¶ 143.

¹⁰⁸ See 47 C.F.R. §§ 22.972(a)(2), 90.674(a)(2).

¹⁰⁹ See 47 C.F.R. § 1.925 (setting forth waiver standard).

¹¹⁰ *800 MHz R&O*, 19 FCC Rcd 15044-45 ¶ 140

¹¹¹ *Id.* at 15043 ¶ 138.

any disingenuous allegations that the good faith obligation has been breached.

G. Band Reconfiguration Mandatory Schedule

1. Eighteen-Month Benchmark (Former General Category Channels 1-120)

51. In the *800 MHz R&O*, we adopted an interim benchmark whereby, within eighteen months of release of a *Public Notice* announcing the start date of band reconfiguration in the first NPSPAC region, Nextel must complete, and the Transition Administrator must certify that Nextel has completed, the retuning of former Channels 1-120 (within the current General Category channels) in twenty NPSPAC Regions.¹¹²

52. We imposed this benchmark because the band plan appeared to represent that the General Category channels would first be cleared of all incumbents and that the NPSPAC licensees would immediately be relocated into the 806-809 MHz/ 851-854 MHz segment of the General Category. We now realize that the parties intended only relocating incumbents—other than Nextel and SouthernLINC—from former Channels 1-120.¹¹³ Thus, Nextel and SouthernLINC would meet a portion of their subscriber demand by retaining their Channel 1-120 facilities while the band is being reconfigured. Only as a last step in the process would former Channels 1-120 become available for use by the NPSPAC licensees and their facilities retuned to these channels.

53. In light of the foregoing, we agree it would be impractical for Nextel to meet the eighteen-month benchmark established in the *800 MHz R&O*.¹¹⁴ Nonetheless, we remain convinced that the public's interest in timely completion of band reconfiguration demands that a meaningful midpoint benchmark be maintained. Accordingly, and with the benefit of a better understanding of the proposed band reconfiguration process, we are requiring Nextel to meet a two-fold benchmark eighteen months after band reconfiguration has commenced. By that time it must have:

- Relocated all but Nextel and SouthernLINC incumbents from Channels 1-120 in the first twenty NPSPAC Regions the Transition Administrator has scheduled for band reconfiguration; and,
- Initiated retuning negotiations with all NPSPAC licensees in said Regions. "Initiated" as the term is used here means, at a minimum, contacting the NPSPAC licensee in writing, and with at least one oral two-way communication, setting out the proposed schedule of relocation, with proposed dates for each element thereof, and requesting from the NPSPAC licensee, within a date certain, a written, itemized estimate of the cost of reconfiguring its system(s). Evidence that the retuning negotiations have commenced shall be in the form of a written communication from the NPSPAC licensee.

Although we have modified the eighteen month benchmark, *supra*, we reiterate that Nextel must totally

¹¹² *Id.* at 15130 ¶ 346. We may consider and exercise any appropriate enforcement action within our authority, including assessment of monetary forfeitures or, if warranted, license revocation if Nextel failed to meet this interim benchmark, for reasons that Nextel, with the exercise of due diligence, could reasonably have avoided. *Id.*

¹¹³ *See Sep. 16 Ex Parte* at 2.

¹¹⁴ *See id.*

complete band reconfiguration within no more than thirty-six months from the commencement date discussed in the following paragraph.

54. We decline to adopt Nextel's blanket request that it be allowed to operate on all vacant and vacated channels below 817 MHz/862 MHz during band reconfiguration.¹¹⁵ We agree with those parties which argue that this request, coupled with the relaxed eighteen-month benchmark, could provide Nextel an incentive to delay completing band reconfiguration for as long as possible.¹¹⁶ Thus we will entertain individual applications from Nextel for such channels on the same basis as applications from any other eligible entity seeking to acquire new channels prior to imposition of the freeze set out in the *800 MHz R&O*.¹¹⁷

55. The *800 MHz R&O* specifies that the eighteen-month and thirty-six-month benchmarks are measured against the date the Commission releases a *Public Notice* announcing the start date of reconfiguration in the first NPSPAC Region. Since release of the *800 MHz R&O*, we have gained additional insight into the complexity of the rebanding process, including the hiring of personnel, the complexity of the information necessary to develop schedules and the attendant need to coordinate with equipment manufacturers. In order to avoid initial missteps in these processes which ultimately could impair progress, we agree that it is reasonable to issue a *Public Notice* announcing the starting date for computation of the eighteen and thirty-six-month benchmarks. That *Public Notice* will state that the starting date for computation of the benchmarks will be a date thirty days after the issuance of said *Public Notice*.¹¹⁸

H. Secondary, Mobile-Only Operations

56. Currently, public safety and Critical Infrastructure Industry licensees operate fewer than fifty mobile-only systems on former 800 MHz Channels 1-120 on a secondary basis.¹¹⁹ The *800 MHz R&O* does not specifically address whether these secondary, mobile-only systems must be moved from former Channels 1-120. Because these stations are secondary, and do not have as great a potential for interference as base stations, we do not believe it necessary to remove them from former Channels 1-120 and will continue to accept public safety and CII applications for such secondary, mobile-only operations on these channels.

I. Licensing Issues

57. In the *800 MHz R&O*, we divided the lower portion of the 800 MHz band, *i.e.*, frequencies below 817/862 MHz, into four pools or categories: General Category, Public Safety, B/ILT, and SMR.¹²⁰

¹¹⁵ See *id.* at 1.

¹¹⁶ See *Cinergy Comments* at 8-10; *Entergy Comments* at 5-7.

¹¹⁷ *800 MHz R&O*, 19 FCC Rcd 15078 ¶ 204.

¹¹⁸ This revision in computation-of-time dates is consistent with that proposed by Nextel. See Attachment to *Sep. 21 Nextel Ex Parte* at 4.

¹¹⁹ See, e.g., Station KA61037. A licensee that operates on a secondary basis must accept interference from primary operations and may not cause interference to primary operations. See 47 C.F.R. § 90.7.

¹²⁰ See *800 MHz R&O*, 19 FCC Rcd 14977 ¶ 11; see also *800 MHz R&O* Appendix C, §§ 90.615 and 90.617, 19 FCC Rcd 15180-15185.

Prior to the *800 MHz R&O*, our Rules specified similar groupings. However, rules adopted in the *800 MHz R&O* changed operations in the pools and redistributed frequencies within the pools. This redistribution has raised questions concerning eligibility and licensing requirements for certain frequencies in these pools.¹²¹ We take this opportunity to clarify certain aspects of the licensing process for this lower portion of the band. We also make changes that promote consistency and flexibility in the 800 MHz band reconfiguration rules.

58. Nextel will relinquish all of its 800 MHz spectrum holdings below 817/862 MHz as part of band reconfiguration.¹²² Other ESMR licensees may also relocate from the lower portion of the 800 MHz band. Eligibility for any ESMR-vacated spectrum in the lower portion of the 800 MHz band that is available after reconfiguration is complete in a given NPSPAC region, except for vacated spectrum in the Public Safety Pool, will be limited to public safety and CII eligibles.¹²³ These channels will be available to public safety for the first three years following the completion of band reconfiguration of the NPSPAC region and to public safety and CII eligibles for the following two years.¹²⁴ After this time, any eligible entity can apply for ESMR-vacated spectrum. However, eligibility for ESMR-vacated spectrum in the public safety pool is limited to public safety.¹²⁵ The Commission will announce by *Public Notice* when entities may file for ESMR-vacated spectrum in a given NPSPAC region. Any recognized Part 90 frequency-coordinator for the pool where the vacated spectrum is located can coordinate frequencies in that pool.¹²⁶

59. We hereby clarify the licensing status of site-based SMR frequencies which are vacated by ESMR licensees. These channels will be reserved for five years after the completion of band reconfiguration in a given NPSPAC region for public safety and CII licensees as described *supra*. This will be the case even if these vacated site-based SMR channels are located within another SMR licensee's EA. After five years, any of these vacated site-based SMR channels—which are still available—will revert to the SMR licensee holding the EA license for that geographic area. If there is no EA licensee for a particular area, then after five years, these vacated site-based SMR channels will be available for

¹²¹ See, e.g., *Shulman Rogers Comments* at 11, 14.

¹²² See *800 MHz R&O*, 19 FCC Rcd 14977 ¶ 11.

¹²³ See *id.* at 15052 ¶ 152.

¹²⁴ *Id.* This eligibility restriction also applies to channels vacated by licensees electing to relocate to the Guard Band. See 47 C.F.R. §§ 90.615(a) and (b). While we originally restricted eligibility to this vacated spectrum from the effective date of the *800 MHz R&O*, we modify this date now to ensure that all public safety and CII licensees enjoy the same amount of exclusive access to ESMR-vacated spectrum.

¹²⁵ There should be very few ESMR-vacated channels in the public safety pool. There may be some as a result of the exchange of twelve public safety channels with twelve SMR channels to create the expansion band. See *800 MHz R&O*, 19 FCC Rcd 15053 ¶ 155. We clarify here that B/ILT eligibles, including CII entities, can apply for these frequencies under the inter-category sharing rules, but only after five years.

¹²⁶ A list of Part 90 800 MHz band frequency coordinators is available on the Commission's web page (<http://wireless.fcc.gov/services/plmrs/>). Although any coordinator may file applications involving these frequencies, inter-category sharing applications require the concurrence of an in-pool coordinator. For example, if a public safety applicant is seeking to apply for ESMR-vacated spectrum in the B/ILT Pool, the applicant's coordinator must obtain concurrence from a Commission-certified frequency coordinator having jurisdiction over the B/ILT pool. This approach is consistent with the current procedure governing inter-category sharing applications.

site-based licensing to SMR eligibles.¹²⁷

1. General Category Pool.

60. Under the 800 MHz R&O, the new General Category Pool consists of Channels 231-260 and 511-550.¹²⁸ Frequencies in this pool are available for public safety, B/ILT and SMR (site based, non-cellular) operations. The former rules for the General Category channels required applicants for site-based stations to provide a showing of frequency coordination.¹²⁹ The frequency coordination requirement did not, however, pertain to geographic area licenses (non site-based stations). We clarify here that we will not require frequency coordination for stations associated with grandfathered geographic area licenses. When coordinating new site-based licenses or major modifications to existing site-based licenses, the interference contours (22 dBμV/M) of any or new modified site-based licensees must not extend beyond the boundaries of the co-channel geographic licensees' EAs. This requirement applies regardless of frequency pool. Further, except as noted *infra*, we will continue to apply the frequency coordination requirement to site-based applications. We note that the 800 MHz R&O charges the Transition Administrator with developing a master 800 MHz band reconfiguration plan.¹³⁰ In that process, a relocating incumbent receives a replacement channel for each existing channel requiring relocation.¹³¹ The replacement channels must conform to applicable Commission rules. Requiring separate frequency coordination in this context would be superfluous; we therefore clarify that we are not requiring evidence of frequency coordination for applications for modifications of license to channels designated by the Transition Administrator as part of band reconfiguration.¹³² However, applications filed after the completion of band reconfiguration in a given NPSAC region will be subject to the frequency coordination requirements specified in Section 90.175 of our Rules.¹³³

61. The 800 MHz R&O envisioned clearing Channels 231-260 of all non-public safety, non-CII incumbents. Nextel has argued that relocating incumbent B/ILT or high-site SMR licensees from Channels 231-260 is unnecessary to implement band reconfiguration, would disrupt incumbents without countervailing public interest benefits, and would not result in any additional spectrum becoming available for public safety use.¹³⁴ We agree, and upon further reflection, we modify our decision and will

¹²⁷ See ¶¶ 67-68, *infra*.

¹²⁸ See *id.*, Appendix C, § 90.615. See para 50 *infra*.

¹²⁹ See 47 C.F.R. § 90.175.

¹³⁰ See 800 MHz R&O, 19 FCC Rcd 15075 ¶ 201.

¹³¹ *Id.* at 15074 ¶ 199.

¹³² We anticipate that, in a very few instances, 800 MHz band reconfiguration modification applications may be filed where the licensee is requesting more than just adding a new channel(s). For example, the station location may need to be changed or the power increased. Frequency coordination is required for 800 MHz band reconfiguration modification applications involving a major change other than the addition of one or more channels consistent with the Transition Administrator plan.

¹³³ See 47 C.F.R. § 90.175.

¹³⁴ See *Sep. 16th Nextel Ex Parte* at 2. See also *ITA Comments* at 9-10. But see *Comments of Preferred Communications Systems, Inc.* at 27-28 filed Dec 2, 2004 (*Preferred Comments*) (clearing Channels 231-260 would provide public safety additional public safety spectrum).

allow non-public safety and non-CII incumbents to continue to operate on Channels 231-260. This modification is consistent with our goal to minimize disruption and strikes a reasonable balance between the needs of private wireless interests and public safety spectrum capacity needs. If we were to retain our earlier decision to make Channels 231-260 available exclusively for Public Safety and CII use, we would inadvertently disrupt existing private wireless operations because they might be required to relocate unnecessarily. Additionally, requiring private wireless incumbents to relocate would ignore the reality that there may be insufficient spectrum elsewhere in the 800 MHz band to which these non-Nextel Channel 231-260 incumbents could relocate. Moreover, this modification does not eliminate some of the spectrum gains for public safety and CII licensees, which could be used to meet interoperability needs, as public safety and CII would continue to have access to ESMR-vacated spectrum.

62. Finally, we inadvertently omitted listing channels in the 816-817/861-862 MHz band (*i.e.*, Guard Band channels 511-550) in the rules. Since this spectrum is available for licensing to a wide variety of users (*e.g.*, B/ILT and SMRs), we believe this spectrum is most appropriately categorized as General Category. Consistent with our approach to the other General Category spectrum discussed above, frequency coordination is required for these frequencies except for 800 MHz modification applications associated with band reconfiguration and stations associated with grandfathered EA licensees.¹³⁵

2. Public Safety Pool.

63. The Public Safety Pool consists of two basic sub-groups: the public safety pool frequencies in the interleaved segment of the band and the NPSPAC frequencies. Because these two groups are licensed differently, they are treated separately, *infra*.¹³⁶

64. *Interleaved Segment:* The public safety pool channels in the interleaved segment of the band are interspersed with channels in other pools throughout the 809-815/854-860 MHz band segment.¹³⁷ Frequencies in this group are available, in general, only to public safety eligibles.¹³⁸ As noted above, we clarify that applications for modification of facilities in the interleaved segment that only involve a change in frequency in order to implement the relocation channel plan established by the Transition Administrator need not be accompanied by evidence of frequency coordination.¹³⁹ Applications filed after the completion of band reconfiguration in a given NPSPAC region will be subject to the frequency

¹³⁵ EA licensees are grandfathered. *See 800 MHz R&O*, 19 FCC Rcd 15054 ¶ 157. Grandfathered EA licenses are subject to Sections 90.681-699 (47 C.F.R. §§ 90.681-90.699).

¹³⁶ For example, NPSPAC frequencies are subject to regional planning and the interleaved public safety frequencies are not.

¹³⁷ *See* 47 C.F.R. § 90.617, Table 1 for a specific list of these frequencies.

¹³⁸ *See* 47 C.F.R. § 90.20. These channels are also available to B/ILT eligibles through inter-category sharing. *See 800 MHz R&O* Appendix C, § 90.621(e), 19 FCC Rcd 15190. Finally, the Commission grandfathered non-cellular SMR licensees operating on these channels. *See 800 MHz R&O*, 19 FCC Rcd 15054 ¶ 156.

¹³⁹ Coordination is unnecessary because the Transition Administrator will have taken coordination issues into account in determining that the new channel offers “comparable facilities.” We are not certifying the Transition Administrator as a frequency coordinator; but expect that the Transition Administrator will enlist the assistance of the relevant Commission-certified frequency coordinator in instances in which coordination issues arise.

coordination requirements specified in Section 90.175 of our Rules.¹⁴⁰ The frequency coordination requirement also does not apply to stations associated with grandfathered geographic area licenses.¹⁴¹

65. *NPSPAC Channels.* Public safety entities have exclusive access to the NPSPAC frequencies (Channels 1-230).¹⁴² Under the 800 MHz reconfiguration plan, the licenses of current NPSPAC licensees¹⁴³ will be modified by moving the current operating frequencies fifteen megahertz downward, thereby transferring the entire NPSPAC band to its new allocation at 806-809/851-854 MHz.¹⁴⁴ Because these modifications involve only a uniform frequency change for each applicant, the current coverage/interference environment will remain the same after the modification. Hence we will not require these applications to have evidence of frequency coordination. Moreover, we will not require approval of, nor consider objections from, Regional Planning Committees for such modifications. Thus, for example, any NPSPAC licensee currently operating at variance with a Regional Plan will have its operating channel(s) modified in the same manner as other NPSPAC licensees. Once band reconfiguration has been accomplished in a given NPSPAC region, the relevant Regional Planning Committee shall conform its plan to the new allocation and file said amended plan with the Commission within thirty days. These amended plans shall not contain any changes other than moving each frequency in the plan fifteen megahertz downward and will not require Commission approval.

3. Business/Industrial/Land Transportation (B/ILT) Pool.

66. The B/ILT pool consists of interleaved channels in the 809-816/854-861 MHz band segment.¹⁴⁵ Channels in this pool, in general, are available only to B/ILT eligibles.¹⁴⁶ Applications for modification of B/ILT licensees as specified by the Transition Administrator in order to implement band reconfiguration need not be accompanied by evidence of frequency coordination.¹⁴⁷ Applications filed after the completion of band reconfiguration in a given NPSPAC region will be subject to the frequency

¹⁴⁰ See 47 C.F.R. § 90.175. We clarify that only recognized Part 90 800 MHz public safety coordinators can coordinate frequencies in this pool.

¹⁴¹ See n. 125 *supra*.

¹⁴² The assignment of these frequencies is done in accordance with policies defined in Development and Implementation of a Public Safety National Plan and Amendment of Part 90 to Establish Service Rules and Technical Standards for Use of the 821-824/866-869 MHz Bands by the Public Safety Services, *Report and Order*, GEN Docket No. 87-112, 3 FCC Rcd 905 (1987) (*NPSPAC R&O*).

¹⁴³ NPSPAC licensees currently operate in the 821-824 MHz / 866-869 MHz band segment. The process for relocation of NPSPAC channels in the border areas may differ from that described *supra* for the remainder of the country. We cannot address those differences here because final border-area band plans have not yet been developed by U.S., Canadian, and Mexican, authorities.

¹⁴⁴ See *800 MHz R&O*, 19 FCC Rcd 15072 ¶ 195.

¹⁴⁵ For specific frequencies see 47 C.F.R. § 90.617, Table 2.

¹⁴⁶ See 47 C.F.R. § 90.35. EA licensees are grandfathered.

¹⁴⁷ See n.139 *supra*.

coordination requirements specified in Section 90.175 of our Rules.¹⁴⁸

4. SMR Pool (Non-cellular)

67. This pool consists of interleaved channels in the 809-816/854-861 MHz band.¹⁴⁹ Frequencies in this pool are available for commercial operations.¹⁵⁰ There are both site-based and EA geographical-area licenses in this pool. Applications for modification of SMR licenses as specified by the Transition Administrator in order to implement band reconfiguration need not be accompanied by evidence of frequency coordination.¹⁵¹ Applications filed after the completion of band reconfiguration in a given NPSPAC region will be subject to the frequency coordination requirements specified in Section 90.175 of our Rules.¹⁵² Finally, we note that grandfathered EA licensees remain subject to Sections 90.681-90.699 of our Rules.¹⁵³

68. In the former SMR pool where geographic area licensing was employed there was no requirement for a showing of frequency coordination and hence no recognized frequency coordinators for this pool. By requiring frequency coordination for certain stations operating in this pool we must authorize frequency coordinators to conduct the coordinations. Because this pool is similar to the General Category (*e.g.*, spectrum is available to a wide variety of users—public safety, B/ILT, SMRs) we believe we should take the same approach that we did for coordinating frequencies in the General Category and certify multiple coordinators. Based on our experience, we conclude that 800 MHz General Category coordinators are qualified to coordinate spectrum in the SMR pool.¹⁵⁴ Any of these coordinators interested in coordinating frequencies in this pool must notify the Wireless Telecommunications Bureau¹⁵⁵ within forty-five days of release of this *Order*.¹⁵⁶ In all other cases, including applications for ESMR-vacated spectrum available after band reconfiguration is complete in a given NPSPAC region; the frequency coordination requirements specified in Section 90.175 of our Rules¹⁵⁷ apply to frequencies in

¹⁴⁸ See 47 C.F.R. § 90.175. We clarify that only recognized Part 90 800 MHz B/ILT coordinators can coordinate frequencies in this pool.

¹⁴⁹ For specific frequencies *see* 47 C.F.R. § 90.617, Table 4B.

¹⁵⁰ We clarify that the frequencies in this pool can also be used for public safety and B/ILT operations.

¹⁵¹ *See* n. 139 *supra*.

¹⁵² *See* 47 C.F.R. § 90.175.

¹⁵³ *See* 47 C.F.R. §§ 90.681-699.

¹⁵⁴ *See* United Telecom Council Informal Request for Certification as a Frequency Coordinator in the PLMR 800 MHz and 900 MHz Bands, *Order*, 16 FCC Rcd 8436 (2001) (*Coordination Order*).

¹⁵⁵ We note here that the Wireless Telecommunications Bureau has delegated authority to select frequency coordinators in the services it administers. *See* Amendment of Parts 2 and 95 of the Commission's Rules to Create a Wireless Medical Telemetry Service, *Report and Order*, ET Docket No. 99-255, 15 FCC Rcd 11206, 11218 ¶ 36 (2000).

¹⁵⁶ Notification should be addressed to the Public Safety and Critical Infrastructure Division, Federal Communications Commission, 445 12th Street, S.W., Washington, D.C. 20554. *See Coordination Order*, 16 FCC Rcd 8445 ¶ 18.

¹⁵⁷ *See* 47 C.F.R. § 90.175.

this pool.

J. Cost Responsibility

1. Nextel Retuning

69. The *800 MHz R&O* limits Nextel's credit for funds spent reconfiguring its own 800 MHz system to expenditures strictly limited to costs absolutely essential to implement band reconfiguration and shall not include any costs for improvement, by way of equipment replacement or otherwise, of the capacity or features of Nextel's infrastructure or subscriber units.¹⁵⁸ At Nextel's request, we clarify that this prohibition does not extend to "capacity" cells that are necessary to sustain subscriber capacity of Nextel's system during band reconfiguration and which, thereafter, remain in service, potentially increasing Nextel's overall post-reconfiguration subscriber capacity.¹⁵⁹ We disagree with Cingular's contention that Nextel's request is untimely and that Nextel should have sought credit for these costs prior to the release of the *800 MHz R&O*.¹⁶⁰ Because the concept of the "true-up" with the attendant discussion of what constituted creditable costs originated in the *800 MHz R&O*, it is disingenuous to argue that Nextel should have anticipated this issue. Moreover, Nextel is merely seeking the same rights as any other relocating 800 MHz licensee—the right to comparable facilities. In the case of each "capacity" cell, we require Nextel to demonstrate to the Transition Administrator that said cell is essential to maintaining subscriber levels during band reconfiguration. Assuming that Nextel meets that burden, we will permit Nextel to include the cost of the cell as part of Nextel's legitimate expenses incurred in band reconfiguration. We are sensitive, however, to the argument Nextel may attempt to leverage this provision into an inappropriate subsidy for the construction of its 1.9 GHz network.¹⁶¹ We therefore direct the Transition Administrator to disallow Nextel credit for facilities associated with the 1.9 GHz band. We further note that Nextel may not claim credit for any expenditure it makes to obtain additional spectrum in any band, whether by purchase, lease or some other secondary market mechanism.¹⁶²

2. Transactional Costs

70. Although we recognized that band reconfiguration to resolve the unacceptable interference would be costly,¹⁶³ we were concerned that sole reliance upon Enhanced Best Practices would entail a continuing expense that would eventually eclipse the high initial cost of band reconfiguration.¹⁶⁴ To address cost reimbursement issues we adopted rules that tracked rules the Commission has successfully used to accomplish previous band reconfigurations.¹⁶⁵ We note, as one party has pointed out,¹⁶⁶ that there

¹⁵⁸ See *800 MHz R&O*, 19 FCC Rcd 14989 n.74.

¹⁵⁹ See Attachment to *Nextel Sep. 21 Ex Parte* at 8.

¹⁶⁰ *Cingular Comments* at 2-3.

¹⁶¹ *Cingular Comments* at 3-5.

¹⁶² Regardless of whether Nextel obtains this spectrum via auction, secondary market transactions, spectrum purchase or a leasing arrangement.

¹⁶³ *800 MHz R&O*, 19 FCC Rcd 15064 ¶ 177.

¹⁶⁴ *Id.*

¹⁶⁵ *800 MHz R&O*, 19 FCC Rcd 15048 ¶ 148 & n.398 citing 47 C.F.R. § 90.699(d).

is a conflict between the statement in the *800 MHz R&O* that Nextel must absorb all costs of band reconfiguration, including transactional costs, and the provision in existing rule Section 90.699(c), which we incorporated by reference in the *800 MHz R&O*, which limits transactional costs to no more than “2% of the hard costs involved.”¹⁶⁷ We resolve that conflict in favor of the statement in the text of the *800 MHz R&O*, but believe that the two-percent restriction in the rule provides a useful guideline for determining when transactional costs are excessive or unreasonable and charge the Transition Administrator to give a particularly hard look at any request involving transactional costs that exceed two percent. We believe that, in the vast majority of cases, the party requesting transactional costs in excess of two percent will have to meet a high burden of justification. However, we decline to use two percent as a fixed limit in the knowledge that, particularly with respect to public safety entities, outside expertise may be required in the negotiation of agreements and in analysis of “comparable facilities” proposals. We can foresee that such outside costs could raise the transactional cost above two percent of the “hard costs.” Moreover, the instant band reconfiguration process is distinguished from others in which Section 90.699(c) applied, by the presence of the Transition Administrator which serves, *inter alia*, as a watchdog over excess transactional costs and “goldplating.” We were clear in the *800 MHz R&O* that parties must submit disputes involving cost allocations to the Transition Administrator for resolution.¹⁶⁸ In the event that the Transition Administrator is unable to resolve the dispute the matter will be referred to the Wireless Telecommunications Bureau for *de novo* review.¹⁶⁹ These provisions should provide a sufficient safeguard against excessive claims for transactional costs associated with band reconfiguration.

K. Payment Authorization and Auditing

71. Under the terms of the *800 MHz R&O*, we defined the role of the Transition Administrator broadly and, by way of example, listed duties that would fall within the expertise of the Transition Administrator. These duties include, but are not limited to, the authorization of funds to licensees, vendors, *etc.*,¹⁷⁰ establishing the schedule setting forth the commencement of band reconfiguration in each NPSPAC region,¹⁷¹ auditing the amount expended at the conclusion of a system reconfiguration,¹⁷² and submitting an audited statement of relocation funds expended at each anniversary date of the *800 MHz R&O*.¹⁷³ Concern has been expressed that we did not state explicitly that the Transition Administrator could authorize disbursement of funds before retuning of a given system begins.¹⁷⁴ As noted in paragraph (Continued from previous page)

¹⁶⁶ *Shulman Rogers Comments* at 10.

¹⁶⁷ 47 C.F.R. § 90.699(c).

¹⁶⁸ *800 MHz R&O*, 19 FCC Rcd 15064, ¶ 178.

¹⁶⁹ *800 MHz R&O*, 19 FCC Rcd 15064, 15071-73 ¶¶ 178, 194-197.

¹⁷⁰ *800 MHz R&O*, 19 FCC Rcd 15072 ¶ 195 and n.513.

¹⁷¹ *800 MHz R&O*, 19 FCC Rcd 15073 ¶ 196. On November 24, 2004, the Public Safety and Critical Infrastructure Division extended the deadline for the Transition Administrator to submit the schedule until January 31, 2005. See Improving Public Safety Communications in the 800 MHz Band, *Order*, DA 04-3676 ¶ 6 (WTB PSCID Nov. 24, 2004).

¹⁷² *800 MHz R&O*, 19 FCC Rcd 15073 ¶ 197.

¹⁷³ *800 MHz R&O* 19 FCC Rcd 15073 ¶ 196.

¹⁷⁴ *Shulman Rogers Comments* at 6.

14, *supra*, the Transition Administrator may authorize disbursement of funds upon approval of a negotiated estimate of the cost of reconfiguring an existing system and that the cost of preparing the estimate and costs of negotiating the agreement are allowable and can be provided in advance upon application to the Transition Administrator. We have been asked whether costs incurred by public safety systems in advance of the commencement of band reconfiguration would be eligible for reimbursement.¹⁷⁵ We affirm here that our description of the duties of the Transition Administrator, as set forth in the *800 MHz R&O*, was illustrative, not exhaustive, and that the Transition Administrator may authorize the disbursement of funds for any reasonable and prudent expense directly related to the retuning of a specific 800 MHz system. We also clarify that the Transition Administrator may retain the services of others in connection with its work and that its audit process must conform to the Generally Accepted Accounting Procedures and industry standards.¹⁷⁶

72. As noted *supra*, our description of the duties of the Transition Administrator was not exhaustive. The overriding obligation of the Transition Administrator is to facilitate timely band reconfiguration in a manner that is equitable to all concerned, including the United States government. We foresee, for example, that the Transition Administrator may exercise its discretion to change the schedule it establishes for band reconfiguration in order to meet unanticipated demands, *e.g.*, to reconfigure two or more regions simultaneously because of the existence of systems spanning multiple regions. The Transition Administrator's authority also extends to such matters as involving manufacturers, installers, and other infrastructure providers in the negotiation of reconfiguration agreements. In sum, the Transition Administrator's portfolio includes taking "the most effective actions, in the short- term and long-term, to promote robust and reliable public safety communications in the 800 MHz band to ensure the safety of life and property."¹⁷⁷

L. Relocation Negotiations

73. The *800 MHz R&O* provides licensees flexibility in negotiating relocation agreements with Nextel. Parties may require the Transition Administrator to deal with Nextel on their behalf or licensees may choose to negotiate directly with Nextel.¹⁷⁸ Similarly, Nextel may require that negotiations with a given licensee take place through the Transition Administrator as an intermediary.¹⁷⁹ The underlying theme governing all reconfiguration negotiations is "good faith."¹⁸⁰ Although we cannot predict what "good faith" may be for all parties in all circumstances, we envision that it extends to making a

¹⁷⁵ Oral communication between David Buchanan, Regional Chairman, Southern California Area Regional Planning Committee, and Michael Wilhelm, Chief, Public Safety and Critical Infrastructure Division, Wireless Telecommunications Bureau, Nov. 15, 2004. *See also PSIC Comments* at 4-6. Comments of the Office of Chief Technology Officer of the District of Columbia at 1-4

¹⁷⁶ We decline to state, as requested by Shulman Rogers, that the services of a Regional Planning Committee in support of band reconfiguration can be compensated. That, and other such determinations would be fact-specific and are committed to the Transition Administrator. *See Shulman Rogers Comments* at 6, 8, 10, 11.

¹⁷⁷ *800 MHz R&O*, 19 FCC Rcd 14975 ¶ 7.

¹⁷⁸ *800 MHz R&O*, 19 FCC Rcd 15075-77 ¶ 201.

¹⁷⁹ *See Sep. 16th Nextel Ex Parte* at 2.

¹⁸⁰ *See 800 MHz R&O*, 19 FCC Rcd 15075-77 ¶ 201. *See also Sep. 21 Nextel Ex Parte* at 7 (requesting clarification of good faith requirement).

counteroffer to a reasonable offer, rather than refusing an offer outright.¹⁸¹ We also caution parties to memorialize agreements in writing to be signed by authorized parties of both the relocating incumbent and Nextel. We finally note that the Transition Administrator cannot unilaterally bind Nextel or the incumbent to any obligation associated with band reconfiguration.¹⁸² Thus, for example, the Transition Administrator cannot unilaterally require Nextel to pay a sum not authorized in an agreement between Nextel and an incumbent.¹⁸³

74. The *800 MHz R&O* states that Nextel personnel shall not be “involved” in the reconfiguring of a licensee’s system.¹⁸⁴ We now recognize that an overly restrictive interpretation of this language could unnecessarily prevent Nextel from utilizing the institutional knowledge that it gained in the Upper 200 relocation process.¹⁸⁵ We therefore determine that the prohibition extends only to Nextel’s personnel gaining direct access to an incumbent’s physical system. Moreover, even that restriction would be inapplicable if the involved licensee explicitly authorized Nextel personnel to physically examine or adjust a system

M. Relocating EA Licensees

75. We clarify several aspects of the *800 MHz R&O* regarding the relocation of non-Nextel non-SouthernLINC EA licensees operating ESMR systems. First, Nextel, AIRPEAK, and Airtel all have sought clarification concerning the process for determining the ultimate location of non-Nextel, non-SouthernLINC ESMR licensees.¹⁸⁶ Nextel supports relocating licensees out of the “non-cellular” channel block to the 816-817/861-862 MHz block before relocating licensees above 817/862 MHz.¹⁸⁷ AIRPEAK and Airtel ask the Commission to clarify that a relocating incumbent may specify the channels to which it will be relocated.¹⁸⁸

¹⁸¹ Evidence of “good faith” may also consist of an explanation of why the offer was rejected. *See e.g., PSIC Comments at 6-7.*

¹⁸² The *800 MHz R&O* contained other indicia of good faith, or not, *e.g.*, (1) whether the party responsible for paying the cost of band reconfiguration has made a *bona fide* offer to relocate the incumbent to comparable facilities; (2) the steps the parties have taken to determine the actual cost of relocation to comparable facilities; and (3) whether either party has unreasonably withheld information, essential to the accurate estimation of relocation costs and procedures, requested by the other party. *See 800 MHz R&O*, 19 FCC Rcd 15076, n.524 *citing* Amendment to the Commission’s Rules Regarding a Plan for Sharing the Costs of Microwave Relocation, *First Report and Order and Further Notice of Proposed Rulemaking*, 11 FCC Rcd 8825, 8837-8838 ¶ 21.

¹⁸³ Note, however, that nothing in this paragraph precludes the Commission from directing Nextel to pay, or an incumbent to accept, any payment arising from Commission adjudication of a dispute between Nextel and an incumbent. *See 800 MHz R&O*, 19 FCC Rcd 15076 ¶ 201.

¹⁸⁴ *See 800 MHz R&O*, 19 FCC Rcd 15075-77 ¶ 198.

¹⁸⁵ *See* Amendment of Part 90 of the Commission’s Rules to Facilitate Future Development of SMR Systems in the 800 MHz Frequency Band, PR Docket No. 93-144.

¹⁸⁶ *See generally AIRPEAK/Airtel Ex Parte and Sep. 16th Nextel Ex Parte at 2.*

¹⁸⁷ *Sep. 16th Nextel Ex Parte at 2.*

¹⁸⁸ *See generally AIRPEAK/Airtel Ex Parte.*

76. *Relocating 800 MHz Geographical Area EA Licensees:* In the 800 MHz R&O, we required that EA licensees such as AIRPEAK and Airtel, must be provided comparable facilities, and afforded them the option of: (a) remaining on their EA Block(s) on a non-interference basis; (b) moving their EA Block(s) as close to the ESMR portion of the band as possible, also on a non-interference basis, or (c) relocating their EA Block(s) into the ESMR portion of the band.¹⁸⁹ We charged the Transition Administrator with determining where, in the ESMR portion of the band, such relocating ESMR licensees should be relocated. We have been offered no good reason why we should either defer to Nextel's request that non-Nextel, non-SouthernLINC licensees be moved to a particular portion of the 800 MHz band, in a particular sequence of channels, or to AIRPEAK's and Airtel's request that they be permitted to choose the specific channels to which they are relocated. As with all incumbents relocated in the course of band reconfiguration—EA licensees or otherwise—incumbents are entitled only to comparable facilities not their choice of channels. Thus, we confer considerable discretion on the part of the Transition Administrator with respect to the choice of replacement channels. However, we envision that the Transition Administrator would commence relocations on channels immediately above 817/862 MHz and progress upward, unless otherwise indicated by considerations of sound spectrum management principles.

77. In the case of an EA licensee with an ESMR system relocating to the ESMR portion of the band, comparable facilities consist of providing encumbrance-free spectrum in the ESMR portion of the band at Nextel's expense. We recognize that, in some instances, the relocating ESMR licensee could benefit by "trading" encumbered spectrum for unencumbered spectrum. We believe this may provide an incentive for such licensees to transition from the interleaved spectrum with a consequent reduction in interference to public safety and other systems. The implementation of the comparable facilities standard rests, initially, with the Transition Administrator and, ultimately, with the Wireless Telecommunications Bureau in the event of intractable disputes.¹⁹⁰

78. *Relocating Site Based Systems Associated With a Relocating ESMR EA licensee.* In the 800 MHz R&O, we stated that non-Nextel EA ESMR licensees which have augmented their EA licenses with site-specific channels may move both their geographic and site-based channels into comparable spectrum above 862 MHz.¹⁹¹ We reiterate what was said in the 800 MHz R&O: in order to transfer a site-based facility into the ESMR segment, a licensee must: (a) currently hold an EA license in the relevant market; and (b) be using the site-based facility as part of a cellular-architecture system in that market as of the date of publication of this *Report and Order* in the Federal Register,¹⁹² and (c) must have been an operational part of the licensee's ESMR system, within the relevant EA. We slightly modify our criteria in this regard to provide that a non-Nextel, non-SouthernLINC, EA licensee, operating an ESMR system

¹⁸⁹ See 800 MHz R&O, 19 FCC Rcd 15056-57 ¶ 162.

¹⁹⁰ If a non-Nextel ESMR licensee agrees to relocate into spectrum between 861-862 MHz, Nextel may satisfy the comparable facility standard by funding the purchase and installation of any filters necessary to allow the licensee to operate without creating unacceptable interference to systems operating below 861 MHz.

¹⁹¹ See 800 MHz R&O, 19 FCC Rcd 15057 ¶ 163.

¹⁹² *Id.* It is possible that a circumstance could arise in which there was a pending, but not yet granted, application for assignment of the license of a site based system to the EA licensee in the same market, and that the site based system already was part of the EA licensee's ESMR system pursuant to a spectrum lease. Should that, or a similar circumstance arise, parties have recourse to the Commission's waiver process to argue that the channels in the site-based system should be moved into the ESMR portion of the band, where they would not be encumbered within the EA.

and relocating to the ESMR portion of the band, may also elect to relocate site-based cells, licensed to it as of the date the *800 MHz R&O* was published in the Federal Register under the following conditions:¹⁹³

- The site-based cell must have been an integral part of the EA licensee's ESMR system as of the date the *800 MHz R&O* was published in the Federal Register. A cell that is an integral part of a ESMR system is a cell that has a 40 dBμ/V coverage contour overlapping the 40 dBμ/V coverage contour of another cell integral to the ESMR system, and must be capable of "hand-off" of calls to and from the cell its 40 dBμ/V coverage contour overlaps.
- Such a site-based cell may be moved into the ESMR spectrum, but is limited to the 40 dBμ/V coverage contour it provided as of the date the *800 MHz R&O* was published in the Federal Register.¹⁹⁴

79. *Relocating non-ESMR EA licensees.* We also clarify several aspects of the *800 MHz R&O* regarding the relocation of non-ESMR EA licensees. Previously, Nextel sought clarification of the *800 MHz R&O* with regard to the relocation channel options for non-ESMR EA licensees.¹⁹⁵ Specifically Nextel sought clarification that non-ESMR EA licensees on channels 1-120 could be relocated to comparable channels below 861.4 MHz only. We clarify and slightly modify that provision to provide that any non-ESMR EA licensee, whether or not it has constructed facilities, has the option to relocate into the ESMR portion of the band. However, when it does so, it receives only the analog of comparable facilities, the same unencumbered area that it had before it relocated, *i.e.*, its "white area." We emphasize that the "white area" the non-ESMR EA licensee attains when it relocates to the ESMR portion of the band is strictly limited to the boundaries of the "white area" that existed before it relocated and which it had on the date the *800 MHz R&O* was published in the Federal Register. If additional unencumbered area in the EA exists after the non-ESMR EA licensee is relocated, that additional unencumbered "white area" will be available for use by Nextel. Moreover, non-ESMR EA licensees that elect to relocate to the ESMR portion of the band—whether they have constructed non-ESMR facilities or not—will be entitled only to reasonable transactional costs, such as for legal and engineering fees directly related to determination of comparable spectrum, such as determining channel assignments or "white area." They will not be entitled in any event to costs associated with infrastructure, replacement of subscriber equipment, tower leases, or any other "hardware related" expenses.¹⁹⁶

80. The following conditions apply to non-ESMR EA licensees that have to relocate in order to implement band reconfiguration, *e.g.*, from channels 1-120, and do not want to exercise the option of relocating to the ESMR portion of the band:

¹⁹³ We will entertain requests for waiver of these conditions provided these waiver requests meet the standards for waiver set forth in Section 1.925 of our Rules. *See* 47 C.F.R. § 1.925

¹⁹⁴ This is true whether the site-based cell is within the EA but on channel(s) outside the EA licensee's block or if the site-based cell falls outside of the geographical boundaries of the EA licensee's EA.

¹⁹⁵ *See e.g.*, Sept. 16 Ex Parte at 2 and Sept. 21, Ex Parte at 8.

¹⁹⁶ We considered whether EA licensees that have constructed non-ESMR, *e.g.*, "high site" SMR, systems should be paid for relocating their hardware systems to the ESMR portion of the band if they elect that option. However, because this relocation is optional, high-site systems are not permitted above 862 MHz, and because such systems employ technology incompatible with ESMR systems, it would not be possible to merely "retune" such systems to new channels. We believe the expense thereof is properly allocated to the non-ESMR EA licensee that chooses to relocate to the ESMR portion of the band.

- *EA Licensees That Have Constructed Systems:* Their existing facilities—infrastructure and subscriber equipment—must be retuned, or, when necessary, replaced, at Nextel’s expense. They must be relocated to new channels which have, at a minimum, the same unencumbered EA geographical area as did their prior channels. If an encumbering facility—other than an ESMR facility¹⁹⁷—is eliminated as a consequence of the change of channels, or subsequently ceases to be licensed, thereby increasing the relocating licensee’s “white area,”¹⁹⁸ the relocating licensee shall be entitled to operate in that increased “white area.”
- *EA Licensees That Have Not Constructed:* These licensees shall be relocated to new channels which have, at a minimum, the same unencumbered geographical area as did their prior channels. If an encumbering facility—other than an ESMR facility¹⁹⁹—is eliminated as a consequence of the change of channels, or subsequently ceases to be licensed, thereby increasing the relocating licensee’s “white area,”²⁰⁰ the relocating licensee shall be entitled to operate in that increased “white area.” These entities will be entitled only to reasonable transactional costs, such as for legal and engineering fees directly related to determination of comparable spectrum, such as determining channel assignments or “white area.” They will not be entitled in any event to costs associated with infrastructure, tower leases, or any other “hardware related” expenses.

81. *Restrictions on All Licensees Relocating to ESMR Spectrum.* Any licensee electing to relocate to the ESMR portion of the band is bound by the rules applicable to ESMR systems and may not operate non-ESMR systems in that portion of the band. Were we to allow otherwise, we could undercut one of the basic tenets of this proceeding: that incompatible “high-site” non-ESMR technology must be segregated from “low-site” ESMR technology if unacceptable interference is to be avoided. It would be contrary to that tenet, indeed, incongruous, to allow “high site” systems in the ESMR portion of the band, or high-density cellular systems in the spectrum below the ESMR portion.²⁰¹ We further note the relocation of any licensee, whether such relocation is voluntary or involuntary, and whenever accomplished, does not act to toll the licensee’s construction deadlines, except as may explicitly be stated otherwise in the 800 MHz R&O.²⁰²

82. *Nextel and SouthernLINC Channels.* Finally, we note that the foregoing discussion of relocating ESMR and non-ESMR licensees does not apply to the relocation of channels licensed to Nextel and SouthernLINC in SouthernLINC’s territory described in Appendix G of the 800 MHz R&O. Those channels are the subject of a separate agreement between SouthernLINC and Nextel which is subject to

¹⁹⁷ Channels vacated by ESMRs are exclusively available to public safety for three years and to public safety and CII applicants in years four and five, and to any eligible applicant thereafter. *See* para. 58 *supra*. The permissible coverage area of a channel(s) so acquired is limited to the permissible coverage area of the vacated ESMR channel(s). *See also* 47 C.F.R. §§ 90.615(a), 90.617(g).

¹⁹⁸ *See* para. 79 *supra*.

¹⁹⁹ *See* n.197 *supra*.

²⁰⁰ *See* para. 79 *supra*.

²⁰¹ *See* 800 MHz R&O, 19 FCC Rcd 15056-57 ¶¶ 162-163.

²⁰² *See* 800 MHz R&O, 19 FCC Rcd 15079 ¶¶ 205-206.

Commission approval.²⁰³

83. In the *800 MHz R&O*, we prohibited the issuance of new 800 MHz EA licenses in Spectrum Blocks G-V.²⁰⁴ However, we recognize that, in the course of band reconfiguration, situations may arise in which it is necessary or desirable for licensees to “exchange” their EA licenses. Such an action constitutes modification of license and does not fall within the prohibition against issuance of “new” licenses.

84. We have considered that the band reconfiguration process could result in Nextel exchanging its EA licenses with other EA licensees that obtained their licenses through auctions in which they received small business bidding credits.²⁰⁵ We find that this Commission mandated exchange does not trigger the “unjust enrichment” provisions of Section 1.2111 of our Rules, which requires refund of the bidding credit, plus interest, if the small business licensee transfers its license, during the initial term, to an applicant not qualifying for such credit. The rule is inapplicable here because the EA licenses at issue are not being transferred, but rather modified by Commission action pursuant to Section 316 of the Communications Act²⁰⁶ as part of a “swap” of 800 MHz spectrum in order to avoid interference to public safety, CII and other “high-site” 800 MHz licensees. The Commission awards bidding credits to licensees based on eligibility for such benefits, not upon the characteristics of the particular spectrum license.²⁰⁷ Here, where there is not a transfer or assignment of a license to trigger a Commission review of whether there is an unjust enrichment eligibility issue, the licensee will retain the designated entity benefits it received, albeit for modified spectrum licenses. All rights and obligations imposed upon the licensees that received licenses through an auction will remain in effect after the modifications.²⁰⁸ Accordingly, we hold that, in the narrow circumstances present here, Section 1.2111 does not require an “unjust enrichment” analysis; and, therefore, that there is no need for waiver of Section 1.2111 of our Rules as suggested by Shulman Rogers.²⁰⁹ The only change to the license will be the frequencies on which the licensee will operate its system.

N. CMRS Relocation to the Guard Band

85. In the *800 MHz R&O* we established a “Guard Band” in the 816-817 MHz/861-862 MHz segment of the 800 MHz band to guarantee public safety licensees an additional one megahertz spectral separation from the cellular portion of the band.²¹⁰ We prohibited the involuntary relocation of

²⁰³ See *800 MHz R&O*, 19 FCC Rcd 15058, 15130 ¶¶ 167, 346.

²⁰⁴ See 47 C.F.R. § 90.617(d).

²⁰⁵ See *Shulman Rogers Comments* at 12.

²⁰⁶ 37 U.S.C. § 316.

²⁰⁷ See 47 C.F.R. § 1.2110.

²⁰⁸ Should a designated entity licensee later seek to assign or transfer its modified spectrum license to an applicant that is not eligible for such benefits, the Commission will conduct an unjust enrichment analysis as of the date of the filing of the application. See, e.g., Amendment of the Commission's Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licenses, WT Docket No. 97-82, *Fourth Report and Order*, 13 FCC Rcd. 15743, 15768 (1998).

²⁰⁹ See *Shulman Rogers Comments* at 12.

²¹⁰ See *800 MHz R&O*, 19 FCC Rcd 15054 ¶ 157.

licensees—including public safety and CII licensees—to the Guard Band and grandfathered all non-Nextel CMRS licensees that currently operate within the Guard Band.²¹¹ Grandfathered licensees could continue operating on their current frequencies, with currently authorized facilities, on a strict non-interference basis, subject to pre-coordination of any new or modified operations.²¹²

86. Subsequent to the release of *800 MHz R&O*, Motient asked us to consider whether it could voluntarily relocate its non-ESMR CMRS systems to the Guard Band²¹³ to, *inter alia*, reduce the possibility that their systems, if later converted to different technology, could cause interference to public safety systems located below 816/862 MHz.²¹⁴ We note that our rules currently permit any licensee currently operating between 851 MHz and 861 MHz, except licensees proposing new ESMR systems, to relocate to the 861-862 MHz Guard Band on a voluntary basis. Thus, to the extent that non-ESMR licensees wish to relocate to Guard Band channels that are: (a) unoccupied; and (b) are not necessary to accommodate existing ESMR systems that have elected to relocate there, such Guard Band channels may be used by licensees, such as Motient, that propose to operate non-ESMR systems there. We also note Motient's request that uniform Guard Band channels be designated for it in all markets in which it operates.²¹⁵ Although we decline to require such uniform designation of channels, we envision that the Transition Administrator will attempt to accommodate such requests from Motient, or any other non-ESMR, licensee seeking to relocate to the Guard Band, so long as such an accommodation is consistent with sound spectrum policy.²¹⁶ We note, however, that, in the event that non-ESMR licensees, such as Motient, elect to move to the Guard Band, they will be subject to the technical and other restrictions associated with the Guard Band, including the sliding scale of interference protection.²¹⁷ Moreover, non-ESMR systems operating in the Guard Band are subject to the same interference restrictions as ESMRs operating in the Guard Band. We further note that if the requesting licensee must be relocated to implement band reconfiguration, the expense associated with relocating the licensee to the Guard Band will be borne by Nextel. Otherwise, the expense shall be borne by the relocating licensee.

O. 800 MHz Application Freeze

87. In the *800 MHz R&O*, we envisioned maintaining a stable spectral status quo during the retuning of each region. To ensure a stable spectral status quo in a particular NPSPAC region, we concluded that we would freeze the acceptance of new 800 MHz applications beginning when we issue the *Public Notice* announcing the date when voluntary negotiation of relocation agreements must be concluded in that region until thirty working days after the completion of mandatory negotiations in that region.²¹⁸ We now recognize, however, that the spectrum environment in a NPSPAC region can be

²¹¹ *Id.*

²¹² *Id.*

²¹³ See *800 MHz R&O*, 19 FCC Rcd 15057 ¶ 162.

²¹⁴ See Letter from Robert A. Mazer, Esq., Counsel to Motient Corporation (Motient), to Marlene H. Dortch, Secretary, Federal Communications Commission (FCC) (filed Dec 8, 2004).

²¹⁵ See Comments of Motient Corporation at 5 (filed Dec. 2, 2004).

²¹⁶ See *800 MHz R&O*, 19 FCC Rcd 15054-55 ¶¶ 157-158.

²¹⁷ *Id.*

²¹⁸ See *800 MHz R&O*, 19 FCC Rcd 15078 ¶ 204.

affected by stations up to seventy miles from the region boundaries. Accordingly, the referenced Public Notice freezing the acceptance of applications will apply to systems within, and up to seventy miles outside, the boundaries of the NPSPAC region.

P. Nextel's 900 MHz Operations

88. In the *800 MHz R&O*, we allowed 900 MHz PLMR licensees to initiate CMRS operations on their currently authorized spectrum or to assign their authorizations to others for CMRS use.²¹⁹ We did so, in part, in the recognition that this would give Nextel the ability to shift some of its 800 MHz operations to 900 MHz while 800 MHz band reconfiguration was being accomplished.²²⁰ Although Section 22.917 of our Rules²²¹ places out-of-band emission limits on Cellular A and B block systems adjacent to the 900 MHz SMR band, and allows us to increase those limits if interference results, Nextel has requested a statement that the rule would, in fact, apply to protect Nextel's 900 MHz operations. Although we believe the rule is clear on its face, we accede to the request and state that it does apply to cellular systems affecting Nextel's 900 MHz operations.²²²

Q. Applications During the Transition Period

89. In the *800 MHz R&O*, we updated our Part 90 rules to reflect the band plan we adopted after reconfiguration of the 800 MHz band.²²³ Specifically, we updated the channel plan and re-designated channels among the various pools (public safety, B/ILT or SMR).²²⁴ Nonetheless, we note that during the transition to a reconfigured 800 MHz band, licensees will continue to operate in accordance with the prior band plan. Furthermore, we note that we permit applicants during the transition period to file applications until we announce an application freeze for a particular NPSPAC region.²²⁵ On our own motion, we clarify that applicants filing before release of the freeze public notice must file for channels available pursuant to the prior band plan unless the application effects a channel change consistent with the band reconfiguration plan.²²⁶ This distinction is particularly important to applicants in the border regions which must apply for channels under the previous 800 MHz band plan until we adopt a new band plan for the border regions.²²⁷ Consequently, in order to provide guidance to applicants that file during the transition period, we are amending our rules to indicate that applicants filing an application before the

²¹⁹ See *800 MHz R&O*, 19 FCC Rcd 15127 ¶¶ 336-337.

²²⁰ See *800 MHz R&O*, 19 FCC Rcd 15127 ¶ 336.

²²¹ See 47 C.F.R. § 22.917(d).

²²² *Id.*

²²³ See *800 MHz R&O*, 19 FCC Rcd 15048-56 ¶¶ 149-161 and Appendix C.

²²⁴ *800 MHz R&O*, 19 FCC Rcd 15161-78, 15180-86, Appendix C, 47 C.F.R. §§ 90.613 and 90.617.

²²⁵ *800 MHz R&O*, 19 FCC Rcd 15078 ¶ 204.

²²⁶ For instance, prior to reconfiguration of a particular NPSPAC region, a NPSPAC licensee filing an application (other than for band reconfiguration) would need to apply for channels in the 821-824 MHz/866-869 MHz portion of the band. Only after a freeze on applications is lifted and the NPSPAC block is relocated would the NPSPAC licensee be eligible to apply for channels in the 806-809 MHz/851-854 MHz portion of the band.

²²⁷ See *800 MHz R&O*, 19 FCC Rcd 15063 ¶ 176.

announcement of an application freeze within a NPSPAC region, should specify channels based on the band plan in effect prior to adoption of the *800 MHz R&O* unless the applicant files a waiver request demonstrating that the application is necessary in order to accomplish band reconfiguration.

R. Comments Outside the Scope of the Public Notice

90. Certain parties filing comments in response to the *Public Notice* issued on October 22, 2004²²⁸ addressed issues unrelated to the matters Nextel had raised in its *ex parte* communications. Inasmuch as those comments were outside the scope of the Public Notice, we have not treated them here. Moreover, we have not addressed in this *Order* each issue raised in said *ex parte* communications. Thus, in the interest of compiling a complete record, we will consider those comments as petitions for reconsideration of the *800 MHz R&O*, together with such other petitions for reconsideration as may be timely filed. In so doing, we are not precluding such parties from filing petitions for reconsideration in addition to the comments they may have filed in response to the *Public Notice*.

IV. CONCLUSION

91. As we stated in the *800 MHz R&O*, there may be no matter within our jurisdiction more crucial to Homeland Security and the overall general safety of life and property than assuring that public safety communications systems are free from unacceptable interference and have adequate capacity.²²⁹ The orders we issue today provide the 800 MHz land mobile radio community with a clearer path to that important goal.

V. PROCEDURAL MATTERS

A. Supplemental Final Regulatory Flexibility Analysis

92. The Regulatory Flexibility Act (RFA)²³⁰ requires that an agency prepare a regulatory flexibility analysis for notice-and-comment rulemaking proceedings, unless the agency certifies that “the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities.”²³¹ The RFA generally defines “small entity” as having the same meaning as the terms “small business,” “small organization,” and “small governmental jurisdiction.”²³² In addition, the term “small business” has the same meaning as the term “small business concern” under the Small Business Act.²³³ A

²²⁸ See n.5 *supra*.

²²⁹ *800 MHz R&O*, 19 FCC Rcd 15128 ¶ 338.

²³⁰ The RFA, see 5 U.S.C. §§ 601-612, has been amended by the Contract With America Advancement Act of 1996, Pub. L. No. 104-121, 110 Stat. 847 (1996) (CWAAA). Title II of the CWAAA is the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA).

²³¹ See 5 U.S.C. § 605(b).

²³² 5 U.S.C. § 601(6).

²³³ 5 U.S.C. § 601(3) (incorporating by reference the definition of “small business concern” in Small Business Act, 15 U.S.C. § 632). Pursuant to 5 U.S.C. § 601(3), the statutory definition of a small business applies “unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register.”

“small business concern” is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the Small Business Administration (SBA).²³⁴ We note that the *Report and Order* in this proceeding included a Final Regulatory Flexibility Analysis in which we provided a description and estimate of the number of small entities to which the rules will apply.²³⁵ We incorporate by reference that list of entities, which consist of Governmental Licensees, Public Safety Radio Licensees, Wireless Telecommunications, Business, Industrial and Land Transportation Licensees, and Specialized Mobile Radio Licensees.

93. In this *Order on Reconsideration* we clarify and revise portions of the *Public Safety Order* to further create a spectrum climate that is conducive to the efficient implementation of the 800 MHz band reconfiguration and operations of 800 MHz band licensees. Accordingly, we

- Explicitly require Nextel to submit its 700 MHz Guard Band licenses to the Commission for cancellation.
- Modify provisions relating to the letter of credit to provide that the letter of credit will serve as a security against default, and will not constitute the corpus of band reconfiguration funds absent a default. We also provide that up to ten financial institutions may issue the letter or letters of credit under certain conditions and provide that we will consider waiver of the conflict of interest provisions governing the Trustee.
- Clarify the scope of the acknowledgment that Nextel must file with the Commission as part of its acceptance of the terms and provisions of the *800 MHz R&O*.
- Clarify the entities from which Nextel must obtain a Letter of Cooperation, committing such entities to make changes necessary to implement 800 MHz band reconfiguration.
- Analyze more recent and comprehensive data on the spectrum holdings of Nextel and revising, accordingly, the credit Nextel receives for spectrum it must surrender as part of the band reconfiguration process.
- Establish interim received power level thresholds that non-cellular systems must maintain in order to claim protection against unacceptable interference during band reconfiguration. These interim threshold levels will remain in effect until band reconfiguration in a particular 800 MHz National Public Safety Planning Advisory Committee (NPSPAC) region is complete at which time the threshold levels adopted in the *800 MHz R&O* go into effect.
- Set out provisions for abating interference to public safety systems that do not meet the interim received power level thresholds during the period in which said interim received power level thresholds are in effect.
- Clarify and amplify certain actions falling within the *800 MHz R&O* requirement that parties conduct their relocation negotiations in good faith.
- Modify the eighteen-month benchmark so that, by that time, Nextel shall have relocated all non-Nextel and non-SouthernLINC incumbents from the former General Category channels 1-120 in

²³⁴ 15 U.S.C. § 632.

²³⁵ See *800 MHz R&O* at Appendix A.

at least twenty NPSPAC regions, and shall have initiated relocation negotiations with all NPSPAC licensees in said regions.

- Clarify that mobile-only systems operating on a secondary basis on former General Category Channels 1-120 may continue to operate on said channels on a secondary basis.
- Clarify when public safety and Critical Infrastructure Industry (CII) licensees gain exclusive access to channels vacated by “Enhanced Specialized Mobile Radio” (ESMR) licensees as a part of band reconfiguration.
- Specify that non-public safety and non-CII incumbents operating on Channels 231-260 may continue to operate on these channels.
- Clarify that a Commission-certified coordinator must coordinate channels vacated by ESMR licensees and applied for after completion of band reconfiguration of a given NPSPAC region.
- Decline to impose a two percent limit on administrative costs associated with incumbent relocation.
- Elaborate on the duties and authority of the Transition Administrator.
- Clarifying which Economic Area (EA) licensees are eligible for relocation to channels above 817 MHz/ 862 MHz.
- Declining to afford relocating licensees their choice of channels, provided that they are relocated to comparable facilities.
- Declining to require that relocating licensees be assigned channels in any particular sequence, but leaving such determination to the Transition Administrator.
- Defining the parameters governing the voluntary relocation of CMRS licensees to the Guard Band.
- Clarify the extent to which Nextel may be involved in the physical process of retuning incumbent systems.
- Prohibit “high site” systems above 817 MHz/862 MHz.
- Clarify that relocation of EA licensees does not constitute issuance of “new” licenses.
- Clarify that license modifications necessary to implement band reconfiguration do not implicate the Commission’s “unjust enrichment” rule.
- Modify the rules affecting the “freeze” on 800 MHz license modification during reconfiguration of a given NPSPAC region.
- Clarify the applicability of Section 22.917 of the Rules to cellular systems causing interference to 900 MHz systems.

94. We note that, of the substantive rule changes, Section 90.175 is deregulatory because applications filed to implement band reconfiguration will not be subject to frequency coordination and Section 90.685 only applies to the Transition Administrator. Changes to Sections 90.613, 90.615, 90.617, 90.621, 90.685, and 90.693 are designed to more accurately reflect the Commission’s 800 MHz band

plan. The Commission certifies, pursuant to the RFA, that the clarifications and rule changes contained in this *Supplemental Order and Order on Reconsideration* will not have a significant economic impact on a substantial number of small entities, including businesses with fewer than 25 employees.

95. **Report to Congress.** The Commission will send a copy of this Supplemental Order and Order on Reconsideration, including this Supplemental Final Regulatory Flexibility Analysis (SFRFA), in a report to be sent to Congress and the General Accounting Office pursuant to the Congressional Review Act.²³⁶ In addition the Commission will send a copy of the *Supplemental Order and Order on Reconsideration* including a copy of this Supplemental Final Regulatory Flexibility Certification, to the Chief Counsel for Advocacy of the SBA.²³⁷ A summary of this *Supplemental Order and Order on Reconsideration* and this certification will also be published in the Federal Register.²³⁸

B. Paperwork Reduction Act Analysis

96. The action contained herein has been analyzed with respect to the Paperwork Reduction Act of 1995 (PRA) and found to impose no new or modified reporting or recordkeeping requirements or burdens to the public, including business with fewer than 25 employees.

VI. ORDERING CLAUSES

97. IT IS ORDERED that, pursuant to the authority of Sections 1, 4(i), 303(f) and (r), 309, 316, and 332 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 303(f) and (r), 309, 316, and 332, the *800 MHz R&O* is modified to the extent described herein.

98. IT IS FURTHER ORDERED that Nextel Communications, Inc. is hereby ORDERED to surrender its spectrum authorizations in the 746-747 MHz, 776-777 MHz 762-764 MHz and 792-794 MHz bands on or before **THIRTY DAYS FROM PUBLICATION OF THIS ORDER IN THE FEDERAL REGISTER.**

99. IT IS FURTHER ORDERED that the rule changes set forth in Appendix A WILL BECOME EFFECTIVE **THIRTY DAYS AFTER PUBLICATION OF THIS ORDER IN THE FEDERAL REGISTER.** This action is taken pursuant to Sections 1, 4(i), 303(f) and (r), 309, 316 and 332 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 303(f) and (r), 309, 316, and 332.

100. IT IS FURTHER ORDERED that the Supplemental Final Regulatory Flexibility Analysis, required by Section 604 of the Regulatory Flexibility Act, 5 U.S.C. 604, and as set forth in herein is ADOPTED.

101. IT IS FURTHER ORDERED that the Commission's Consumer Information and Governmental Affairs Bureau, Reference Information Center, SHALL SEND a copy of this Supplemental Order and Order on Reconsideration, including the Supplemental Final Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

²³⁶ See 5 U.S.C. § 801(a)(1)(A).

²³⁷ See 5 U.S.C. § 605(b).

²³⁸ *Id.*

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch,
Secretary

APPENDIX A FINAL RULES

PART 90 – PRIVATE LAND MOBILE RADIO SERVICES

1. The authority citation for Part 90 continues to read as follows:

(i), 11, 303(g), 303(r), and 302(c)(7) of the Communications Act of 1934, as amended, 47 U.S.C. 154(i), 161, 303(g), 303(r), 332(c)(7).

2. Paragraph (j)(7) of Section 90.175 is modified to indicate that application filed exclusively to modify channels in accordance with band reconfiguration need not show evidence of frequency coordination. Paragraph (j)(7) of Section 90.175 is currently reserved.

§ 90.175 Frequency Coordinator Requirements.

* * * * *

(j) * * *

(7) Applications filed exclusively to modify channels in accordance with band reconfiguration in the 806-824/851-869 MHz band.

* * * * *

3. Section 90.613 is amended to clarify that applicants filing for an application before the announcement of an application freeze within a NPSPAC region, should specify channels based on the band plan in effect prior to adoption of the *800 MHz R&O*.

§ 90.613 Frequencies available.

The following tables indicate the channel designations of frequencies available for assignment to eligible applicants under this subpart. Frequencies shall be assigned in pairs, with mobile and control station transmitting frequencies taken from the 806–824 MHz band with corresponding base station frequencies being 45 MHz higher and taken from the 851–869 MHz band, or with mobile and control station frequencies taken from the 896–901 MHz band with corresponding base station frequencies being 39 MHz higher and taken from the 935–940 MHz band. Only the base station transmitting frequency of each pair is listed in the following tables. Applicants filing for channels prior to the announcement of an application freeze within an 800 MHz NPSPAC region, however, should specify channels based on the table listed in § 90.613 (2003).

* * * * *

4. Section 90.614 is amended to indicate that only ESMR systems may operate in the cellular portion of the 800 MHz band.

§ 90.614 Cellular and non-cellular portions of 806-824/851-869 MHz band for non-border areas.

The 806-824/851-869 MHz band (“800 MHz band”) will be divided as follows at locations farther than 110 km (68.4 miles) from the U.S./Mexico border and 140 km (87 miles) from the U.S./Canadian border (“non-border areas”)

(a) 800 MHz cellular systems – as defined in § 90.7 – are prohibited from operating on channels 1-550 in non-border areas.

(b) Only ESMR systems – as defined in § 90.7 – are permitted to operate on channels 551-830 in non-border areas.

(c) In the following counties and parishes, only ESMR systems – as defined in § 90.7 – are permitted to operate on channels 411-830.

* * * * *

5. Section 90.615 is amended to include channels 511-550 in the General Category and to clarify when public safety and CII licensees have exclusive access to channels 231-260. Section 90.615 is also amended to include Spectrum Block F1 which will now remain intact after band reconfiguration.

§ 90.615 Individual channels available in the General Category in 806-824/851-869 MHz band.

The General Category will consist of channels 231-260 and 511-550 at locations farther than 110 km (68.4 miles) from the U.S./Mexico border and 140 km (87 miles) from the U.S./Canadian border. All entities will be eligible for licensing on these channels except as described in paragraph (a) and (b) below.

(a) In a given 800 MHz NPSPAC region, any channel in the 231-260 range which is vacated by an ESMR licensee and remains vacant after band reconfiguration will be available as follows:

(1) only to eligible applicants in the Public Safety Category until three years after the release of a public notice announcing the completion of band reconfiguration in that region;

(2) only to eligible applicants in the Public Safety or Critical Infrastructure Industry Categories from three to five years after the release of a public notice announcing the completion of band reconfiguration in that region;

(3) to all entities five years after release of a public notice announcing the completion of band reconfiguration in that region.

(b) In a given 800 MHz NPSPAC region, any channel in the 231-260 range which is vacated by a licensee relocating to channels 511-550 and remains vacant after band reconfiguration will be available as follows:

(1) only to eligible applicants in the Public Safety Category until three years after the release of a public notice announcing the completion of band reconfiguration in that region;

(2) only to eligible applicants in the Public Safety or Critical Infrastructure Industry Categories from three to five years after the release of a public notice announcing the completion of band reconfiguration in that region;

(3) to all entities five years after release of a public notice announcing the completion of band reconfiguration in that region.

(b) Spectrum Block F1 consists of channels 236-260.

6. Paragraphs (g) and (h) of Section 90.617 are amended to clarify when public safety and CII licensees will have exclusive access to channels vacated by ESMR licensees or licensees relocating to the Guard Band.

§ 90.617 Frequencies in the 809.750-824/854.750-869 MHz, and 896-901/935-940 MHz bands available for trunked, conventional or cellular system use in non-border areas.

* * * * *

(g) In a given 800 MHz NPSPAC region, channels below 470 listed in Tables 2 and 4B which are vacated by an ESMR licensee and remain vacant after band reconfiguration will be available as follows:

(1) only to eligible applicants in the Public Safety Category until three years after the release of a public notice announcing the completion of band reconfiguration in that region;

(2) only to eligible applicants in the Public Safety or Critical Infrastructure Industry Categories from three to five years after the release of a public notice announcing the completion of band reconfiguration in that region;

(3) five years after the release of a public notice announcing the completion of band reconfiguration in that region, these channels revert back to their original pool categories.

(h) In a given 800 MHz NPSPAC region, channels below 470 listed in Tables 2 and 4B which are vacated by a licensee relocating to channels 511-550 and remain vacant after band reconfiguration will be available as follows:

(1) only to eligible applicants in the Public Safety Category until three years after the release of a public notice announcing the completion of band reconfiguration in that region;

(2) only to eligible applicants in the Public Safety or Critical Infrastructure Industry Categories from three to five years after the release of a public notice announcing the completion of band reconfiguration in that region;

(3) five years after the release of a public notice announcing the completion of band reconfiguration in that region, these channels revert back to their original pool categories.

* * * * *

7. Paragraph (b) of Section 90.621 is amended to include Spectrum Block F1 which will now remain intact after band reconfiguration.

§ 90.621 Selection and assignment of frequencies.

* * * * *

(b) Stations authorized on frequencies listed in this subpart, except for those stations authorized pursuant to paragraph (g) of this section and EA-based and MTA-based SMR systems, will be assigned frequencies solely on the basis of fixed distance separation criteria. The separation between co-channel systems will be a minimum of 113 km (70 mi) with one exception. For incumbent licensees in Channel Blocks F1 through V, that have received the consent of all affected parties or a certified frequency coordinator to utilize an 18 dBμV/m signal strength interference contour (see

§90.693), the separation between co-channel systems will be a minimum of 173 km (107 mi). The following exceptions to these separations shall apply:

(1) Except as indicated in paragraph (b)(4) of this section, no station in Channel Blocks A through V shall be less than 169 km (105 mi) distant from a co-channel station that has been granted channel exclusivity and authorized 1 kW ERP on any of the following mountaintop sites: Santiago Peak, Sierra Peak, Mount Lukens, Mount Wilson (California). Except as indicated in paragraph (b)(4) of this section, no incumbent licensee in Channel Blocks F1 through V that has received the consent of all affected parties or a certified frequency coordinator to utilize an 18 dBµV/m signal strength interference contour shall be less than 229 km (142 mi) distant from a co-channel station that has been granted channel exclusivity and authorized 1 kW ERP on any of the following mountaintop sites: Santiago Peak, Sierra Peak, Mount Lukens, Mount Wilson (California).

* * * * *

(3) Except as indicated in paragraph (b)(4) of this section, stations in Channel Blocks A through V that have been granted channel exclusivity and are located in the State of Washington at the locations listed below shall be separated from co-channel stations by a minimum of 169 km (105 mi). Except as indicated in paragraph (b)(4) of this section, incumbent licensees in Channel Blocks F1 through V that have received the consent of all affected parties or a certified frequency coordinator to utilize an 18 dBµV/m signal strength interference contour, have been granted channel exclusivity and are located in the State of Washington at the locations listed below shall be separated from co-channel stations by a minimum of 229 km (142 mi). Locations within one mile of the geographical coordinates listed in the table below will be considered to be at that site.

* * * * *

8. A new paragraph (b)(6) is added to Section 90.676

§ 90.676 Transition administrator for reconfiguration of the 806-824/851-869 MHz band in order to separate cellular systems from non-cellular systems.

* * * * *

(b) * * *

(6) Notify the Commission when band reconfiguration is complete in each 800 MHz NPSPAC Region and identify which vacant channels are exclusively available to eligible applicants in the Public Safety or Critical Infrastructure Industry Categories as set forth in §§ 90.615(a), (b) and §§ 90.617(g), (h).

9. Paragraph (b) of Section 90.685 is amended to include Spectrum Block F1 which will now remain intact after band reconfiguration.

§ 90.685 Authorization, construction and implementation of EA licenses.

* * * * *

(b) EA licensees in the 809–824/854–869 MHz band must, within three years of the grant of their initial license, construct and place into operation a sufficient number of base stations to provide

coverage to at least one-third of the population of its EA-based service area. Further, each EA licensee must provide coverage to at least two-thirds of the population of the EA-based service area within five years of the grant of their initial license. EA-based licensees may, in the alternative, provide substantial service to their markets within five years of the grant of their initial license. Substantial service shall be defined as: "Service which is sound, favorable, and substantially above a level of mediocre service."

* * * * *

10. Paragraphs (c), and (d)(2) of Section 90.693 are amended to include Spectrum Block F1 which will now remain intact after band reconfiguration.

§ 90.693 Grandfathering provisions for incumbent licensees.

* * * * *

(c) *Special provisions for Spectrum Blocks F1 through V.* Incumbent licensees that have received the consent of all affected parties or a certified frequency coordinator to utilize an 18 dBμV/m signal strength interference contour shall have their service area defined by their originally-licensed 36 dBμV/m field strength contour and their interference contour shall be defined as their originally-licensed 18 dBμV/m field strength contour. The "originally-licensed" contour shall be calculated using the maximum ERP and the actual HAAT along each radial. Incumbent licensees seeking to utilize an 18 dBμV/m signal strength interference contour shall first seek to obtain the consent of affected co-channel incumbents. When the consent of a co-channel licensee is withheld, an incumbent licensee may submit to any certified frequency coordinator an engineering study showing that interference will not occur, together with proof that the incumbent licensee has sought consent. Incumbent licensees are permitted to add, remove or modify transmitter sites within their original 18 dBμV/m field strength contour without prior notification to the Commission so long as their original 18 dBμV/m field strength contour is not expanded and the station complies with the Commission's short-spacing criteria in §§90.621(b)(4) through 90.621(b)(6). Incumbent licensee protection extends only to its 36 dBμV/m signal strength contour. Pursuant to the minor modification notification procedure set forth in 1.947(b), the incumbent licensee must notify the Commission within 30 days of any changes in technical parameters or additional stations constructed that fall within the short-spacing criteria. See 47 CFR 90.621(b).

* * * * *

(d) * * *

(2) *Special Provisions for Spectrum Blocks F1 through V.* Incumbent licensees that have received the consent of all affected parties or a certified frequency coordinator to utilize an 18 dBμV/m signal strength interference contour operating at multiple sites may, after grant of EA licenses has been completed, exchange multiple site licenses for a single license. This single site license will authorize operations throughout the contiguous and overlapping 36 dBμV/m field strength contours of the multiple sites. Incumbents exercising this license exchange option must submit specific information on Form 601 for each of their external base sites after the close of the 800 SMR auction. The incumbent's geographic license area is defined by the contiguous and overlapping 18 dBμV/m contours of its constructed and operational external base stations and interior sites that are constructed within the construction period applicable to the incumbent. Once the geographic license is issued, facilities that are added within an incumbent's existing footprint and that are not subject to prior approval by the Commission will not be subject to construction requirements.

* * * * *

APPENDIX B

ILLUSTRATIVE FORM OF LETTER OF CREDIT

[Subject to Issuing Bank Requirements]

No. _____

[Date of Issuance]

[Trustee]

[Address]

Ladies and Gentlemen:

We hereby establish, at the request and for the account of Nextel Communications, Inc., in your favor, as required under the [Report and Order and Fifth Report and Order and Fourth Memorandum Opinion and Order, and Order dated as of _____, 2004] issued by the Federal Communications Commission ("FCC") in the matter of Improving Public Safety Communications in the 800 MHz Band (the "Order"), our Irrevocable Letter of Credit No. _____, in the amount of [NOTE: the initial aggregate amount of all letters of credit shall add to \$2,500,000,000 (Two Billion Five Hundred Million United States Dollars)], expiring at the close of banking business at our office described in the following paragraph, on [the date which is five years from the date of issuance/ or the date which is one year from the date of issuance, provided the Issuing Bank includes an evergreen clause that provides for automatic renewal unless the Issuing Bank gives notice of non-renewal to the Trustee, with a copy to the FCC, at least sixty days but not more than ninety days prior to the expiry thereof], or such earlier date as the Letter of Credit is terminated by the Trustee (the "Expiration Date"). Capitalized terms used herein but not defined herein shall have the meanings accorded such terms in the Order.

Funds under this Letter of Credit are available to you against your draft in the form attached hereto as Annex A, drawn on our office described below, and referring thereon to the number of this Letter of Credit, accompanied by your written and completed certificate signed by you substantially in the form of Annex B-1 attached hereto and, if applicable, the Transition Administrator's written and completed certificate signed by the Transition Administrator substantially in the form of Annex B-2 attached hereto. Such draft and certificates shall be dated the date of presentation or an earlier date, which presentation shall be made at our office located at [BANK ADDRESS] and shall be effected either by personal delivery or delivery by a nationally recognized overnight delivery service. We hereby commit and agree to accept such presentation at such office, and if such presentation of documents appears on its face to comply with the terms and conditions of this Letter of Credit, on or prior to the Expiration Date, we will honor the same not later than the first banking day after presentation thereof in accordance with your payment instructions. Payment under this Letter of Credit shall be made by [check/wire transfer of Federal Reserve Bank of New York funds] to the payee and for the account you designate, in accordance with the instructions set forth in a draft presented in connection with a draw under this Letter of Credit.

Partial drawings are permitted under this Letter of Credit, and the amount of this Letter of Credit shall be reduced by each such partial draw hereunder.

This Letter of Credit shall be subject to automatic amendment by a decrease in the amount available hereunder to the amount specified in a Transition Administrator's certificate purportedly signed by the Transition administrator or, if not an individual, by two authorized representatives of the Transition Administrator, and countersigned by an authorized signatory of the FCC in the form attached as Annex C, which amendment shall automatically become effective upon receipt of such certificate.

This Letter of Credit shall be canceled and terminated upon receipt by us of the Transition Administrator's certificate purportedly signed by the Transition Administrator or, if not an individual, by two authorized representatives of the Transition Administrator, and in either case countersigned by an authorized signatory of the FCC in the form attached as Annex D.

This Letter of Credit is not transferable or assignable in whole or in part, except that this Letter of Credit may be assigned or transferred to any successor trustee succeeding you upon **[insert Issuing Bank's standard practice language, such as language regarding requirements for timely notification and supplemental documentation.]**

This Letter of Credit sets forth in full the undertaking of the Issuer, and such undertaking shall not in any way be modified, amended, amplified or limited by reference to any document, instrument or agreement referred to herein, except only the certificates and the drafts referred to herein and the ISP (as defined below); and any such reference shall not be deemed to incorporate herein by reference any document, instrument or agreement except for such certificates and such drafts and the ISP.

This Letter of Credit shall be subject to, governed by, and construed in accordance with, the International Standby Practices 1998, International Chamber of Commerce Publication No. 590 (the "ISP"), which is incorporated into the text of this Letter of Credit by this reference, and, to the extent not inconsistent therewith, the laws of the State of New York, including the Uniform Commercial Code as in effect in the State of New York. Communications with respect to this Letter of Credit shall be addressed to us at our address set forth below, specifically referring to the number of this Letter of Credit.

[NAME OF BANK]

[BANK SIGNATURE]

APPENDIX BANNEX AForm of Draft

To: [Issuing Bank]

DRAWN ON LETTER OF CREDIT No: _____

AT SIGHT

PAY TO THE ORDER OF _____ [insert name of
Trustee] BY [CHECK/WIRE TRANSFER OF FEDERAL RESERVE BANK OF NEW
YORK]

FUNDS TO: _____

Account (_____)

AS 800 MHz RELOCATION and TRANSITION PAYMENTS

[AMOUNT IN WORDS] DOLLARS AND NO/CENTS

\$(AMOUNT IN NUMBERS)

[TRUSTEE]

By: _____

APPENDIX BANNEX B-1Draw Certificate

The undersigned hereby certifies to [Name of Bank] (the "Bank"), with reference to (a) Irrevocable Standby Letter of Credit No. [Number] (the "Letter of Credit") issued by the Bank in favor of the [Trustee] and (b) [paragraph 332] of the [Report and Order and Fifth Report and Order and Fourth Memorandum Opinion and Order, and Order] dated as of _____, 2004] issued by the Federal Communications Commission in the matter of Improving Public Safety Communications in the 800 MHz Band (the "Order"), pursuant to which Nextel Communications, Inc. (the "LC Provider") has provided the Letter of Credit (all capitalized terms used herein but not defined herein having the meaning stated in the Order), that:

[i. The Transition Administrator has certified to the Trustee that pursuant to the Order, a payment in the amount of \$ _____ is appropriate to be made to the Trustee to hold in trust and disburse to _____ to satisfy a payment obligation of the LC provider, and further certifying that the Transition Administrator instructs the Trustee to make such payment via draw on Letter of Credit No. _____; and

ii. A copy of the signed certification referred to in clause (i) above and in the form of Annex B-2 to Letter of Credit No. _____, purportedly signed by or on behalf of the Transition Administrator is attached hereto.]

OR

[The FCC has certified to the Trustee that pursuant to paragraph 184 of the Order and the Commission's finding that Nextel is in material breach of the terms of the Order, the Trustee is entitled to receive payment of \$ _____, to hold in trust and disburse in accordance with the terms of the Order.

OR

[The FCC has certified to the Trustee that pursuant to paragraph 185 of the Order, the Commission has approved the use of \$ _____ of letter of credit proceeds to compensate [the Transition Administrator/the Trustee] for their services.]

OR

[The FCC has certified to the Trustee that given notice of non-renewal of Letter of Credit No. _____ and failure of the account party to obtain a satisfactory replacement thereof, pursuant to the Order, the Trustee is entitled to receive payment of \$ _____ representing the remaining amount of Letter of Credit No. _____, to hold in trust and disburse _____ pursuant _____ to _____ the _____ Order.]

OR

[The FCC has certified to the Trustee that pursuant to [paragraph 186 of the Order, the Commission has determined that \$ _____ of letter of credit proceeds be drawn for payment to the United States Treasury/pursuant to paragraph 330 of the Order, Nextel has

elected to apply \$_____ of letter of credit proceeds for payment to the United States Treasury.]

IN WITNESS WHEREOF, the undersigned has executed this certificate as of [specify time of day] on the ____ day of _____, 200__.

[TRUSTEE]

By: _____

Name:

Title:

APPENDIX B
ANNEX B-2

Draw Certificate of Transition Administrator

The undersigned hereby certifies to the [Trustee] (the "Trustee"), with reference to [paragraph 332 of the [Report and Order and Fifth Report and Order and Fourth Memorandum Opinion and Order, and Order dated as of _____, 2004] issued by the Federal Communications Commission in the matter of Improving Public Safety Communications in the 800 MHz Band (the "Order"), pursuant to which Nextel Communications, Inc. (the "LC Provider") has provided the Letter of Credit (all capitalized terms used herein but not defined herein having the meaning stated in the Order), that:

i. _____ [Name of licensee] is an 800 MHz licensee that has obtained a quotation for [estimated expenses/final expenses] in the amount of \$ _____ in connection with transition from _____ [specify spectrum] to _____ [specify spectrum]. On _____ [date] (the "Obligation Date"), this quotation was [deemed reasonable by the Transition Administrator/deemed final after application of the dispute resolution mechanisms in the Order], and notification thereof was made to the LC Provider for payment. The period of forty (40) days has expired since the Obligation Date, without evidence of payment of such obligation by the LC Provider. The Transition Administrator has determined no good causes existed for the LC Provider to fail to honor such payment obligation.

ii. The undersigned has established and will maintain for [specify time period] a file containing documents and records that demonstrate with reasonable specificity according to industry standards and [financial standards for expense documentation / other standards or standards contained in the Order] conclusions stated in its certification in clause (i) above, and such file shall be available during regular business hours for inspection or audit by the auditors specified in the tri-party agreement between the Transition Administrator, the Letter of Credit Trustee and Nextel Telecom dealing with, *inter alia*, the subject matter hereof.

Based on the foregoing, the Transition Administrator hereby directs the Trustee to draw on the Letter of Credit in the amount and for the benefit of the party specified in clause (i) above, and to make payment of the above amount (from the proceeds of the Letter of Credit) by _____ [INSERT DATE seventy (70) days after the Obligation Date] to _____ [name of licensee] payable as follows: [Insert Payment Instructions for licensee/or indicate payment instructions to follow in separate documentation]

IN WITNESS WHEREOF, the undersigned has executed this certificate as of the ____ day of _____, 200__.

[TRANSITION ADMINISTRATOR]

[TWO SIGNATURES REQUIRED IF TRANSITION ADMINISTRATOR IS AN ENTITY; ONE SIGNATURE REQUIRED IF TRANSITION ADMINISTRATOR IS A NATURAL PERSON]

By: _____

Name:

Title:

[By: _____]

Name:

Title:

APPENDIX BANNEX CCertificate Regarding Reduction of Letter of Credit

The undersigned hereby certifies to [Name of Bank] (the "Bank"), with reference to (a) Irrevocable Standby Letter of Credit No. [Number] (the "Letter of Credit") issued by the Bank in favor of the [trustee], and (b) [paragraph 332] of the [Report and Order and Fifth Report and Order and Fourth Memorandum Opinion and Order, and Order] dated as of _____, 2004] issued by the Federal Communications Commission ("FCC") in the matter of Improving Public Safety Communications in the 800 MHz Band (the "Order"), (all capitalized terms used herein but not defined herein having the meaning stated or described in the Order), that:

(1) the undersigned Transition Administrator has documented, pursuant to the Order, that \$_____ [amount] of payments have been made directly by Nextel Communications, Inc. ("Obligor") with respect to Obligor's obligations under the Order to pay for the reconfiguration of the 800 MHz band (the "Reconfiguration Obligations"), and that such amount has not yet been applied towards a reduction of any letter of credit supporting the Reconfiguration Obligations; and (2) the amount of the Letter of Credit shall be reduced to the amount equal to \$_____ [_____ Dollars];and

(3) after applying the reduction referred to in clause (2) above, the aggregate undrawn face amount of all letters of credit supporting the Reconfiguration Obligations will not be less than \$850 million.

IN WITNESS WHEREOF, the undersigned has executed this certificate as of the ____ day of _____, 200__.

[TRANSITION ADMINISTRATOR]

[TWO SIGNATURES REQUIRED IF TRANSITION ADMINISTRATOR IS AN ENTITY; ONE SIGNATURE REQUIRED IF TRANSITION ADMINISTRATOR IS A NATURAL PERSON]

By: _____

Name:

Title:

[By: _____]

Name:

Title:

COUNTERSIGNED:

Federal Communications Commission

By: _____

Name:

Its Authorized Signatory

APPENDIX BANNEX DCertificate Regarding Termination of Letter of Credit

The undersigned hereby certifies to [Name of Bank] (the "Bank"), with reference to (a) Irrevocable Standby Letter of Credit No. [Number] (the "Letter of Credit") issued by the Bank in favor of the [trustee], and (b) [paragraph 332] of the [Report and Order and Fifth Report and Order and Fourth Memorandum Opinion and Order, and Order] dated as of _____, 2004] issued by the Federal Communications Commission ("FCC") in the matter of Improving Public Safety Communications in the 800 MHz Band (the "Order"), (all capitalized terms used herein but not defined herein having the meaning stated or described in the Order), that:

(1) [include one of the following clauses, as applicable]

(a) The Order has been fulfilled in accordance with the provisions thereof;

(b) Nextel Communications, Inc. has paid to the appropriate parties all amounts it is required to pay pursuant to the terms of the Order; or

(c) Nextel Communications, Inc. has provided a replacement letter of credit satisfactory to the FCC.

(2) By reason of the event or circumstance described in paragraph (1) of this certificate, and effective upon the receipt by the Bank of this certificate (countersigned as set forth below), the Letter of Credit is terminated.

IN WITNESS WHEREOF, the undersigned has executed this certificate as of the ____ day of _____, 200__.

[TRANSITION ADMINISTRATOR]

[TWO SIGNATURES REQUIRED IF TRANSITION ADMINISTRATOR IS AN ENTITY; ONE SIGNATURE REQUIRED IF TRANSITION ADMINISTRATOR IS A NATURAL PERSON]

By: _____

Name:

Title:

[By: _____]

Name:

Title:

COUNTERSIGNED:

Federal Communications Commission

By: _____

Name:

Its Authorized Signatory

APPENDIX B
ANNEX E

Terms for Documents Establishing the 800 MHz Relocation Trust and the Relationship between Nextel and the Letter of Credit Trustee (the “Trustee”)

Basic Terms related to the Establishment of the 800 MHz Relocation Trust. The Letter of Credit trustee (the “Trustee”) shall incorporate language to fully effectuate the following summary terms into each item of documentation establishing (i) the trust to receive proceeds of the letter of credit contemplated by the Report and Order (the “800 MHz Relocation Trust”) and (ii) the relationship between Nextel and the Trustee of said trust with respect thereto. Each such document shall be subject to Commission review and approval prior to execution.

- acknowledgment of purpose to effect the 800 MHz transition in support of public safety, and agreement to work in good faith with the other parties pursuant to the Report and Order
- representation and warranty by the Trustee that such entity (not an individual) meets the qualifications set forth in the Report and Order (e.g., independence and absence of conflicts of interest)
- designation of the Commission as an intended third-party beneficiary; no other party to be an intended third-party beneficiary
- definition of completion of the reconfiguration
- term—five years, or until the 800 MHz transition is complete, whichever is earlier
- successor Trustee requires approval of the Commission
- replacement of Trustee at Nextel’s request—define “cause” and require showing of cause and 14 days advance notice to the parties and to the Commission
- election by Trustee to withdraw from arrangement—requires 14 days advance notice to the parties and to the Commission; may require ongoing monetary obligation or duty of Trustee, as applicable (for example, to support transition)
- change of control of Trustee—requires approval of Nextel (so long as Nextel is not then in Default under the Report and Order) and the Commission, which approval shall not be unreasonably withheld but which may be conditional
- notice procedure - specifies which notices shall be copied to the Commission

Terms Specific to the Establishment of the 800 MHz Relocation Trust. At the option of the Trustee, the following points may be covered in one or more agreements (for example, there may be a separate fee letter).

- corpus of trust to be proceeds of one or more LOCs issued for the account of Nextel pursuant to the Report and Order
- Trustee agrees to hold money as fiduciary for 800 MHz licensees and for the Commission; fiduciary obligations fulfilled via handling of funds according to standards applied to corporate trustees, and via disbursement of funds pursuant to instructions issued by the Transition Administrator or the Commission. The Trustee should be a fiduciary of the Transition Administrator
- specifies record-keeping obligations pursuant to the Report and Order
- specifies reporting obligations pursuant to the Report and Order
- specifies audit and inspection rights of Nextel and the Commission, including allocation of costs thereof
- specifies details concerning fees to be paid by Nextel to the Trustee
- specifies that the trust agreement may not be amended, modified or rescinded without approval of the Commission
- specifies that the corpus of the trust(s) shall be forfeit to the United States Treasury to the extent that Nextel fails to make any of the payments owed to the Treasury by the date specified in the Commission's Report and Order
- specifies additional terms of a customary nature for agreements establishing a corporate trust

Terms for Tri-Party Agreement among Nextel, the Transition Administrator and the Letter of Credit Trustee (the “Trustee”)

Basic Terms. The Tri-Party Agreement among Nextel, the Transition Administrator (sometimes referred to herein as the “TA”) and the Trustee shall incorporate language to fully effectuate the following summary terms and shall be subject to Commission review and approval prior to execution:

- acknowledgment of purpose to effect the 800 MHz transition in support of public safety, and agreement to work in good faith with the other parties pursuant to the Report and Order
- representation and warranty by each of the Transition Administrator and the Trustee that such person (individual or entity) meets the qualifications set forth in the Report and Order (e.g., independence and absence of conflicts of interest)
- designation of the Commission as an intended third-party beneficiary; no other party to be an intended third-party beneficiary
- definition of completion of the reconfiguration
- term—five years, or until the 800 MHz transition is complete, whichever is earlier
- successor Transition Administrator/Trustee requires approval of the Commission
- replacement of Transition Administrator/Trustee at Nextel’s request—define “cause” and require showing of cause and 14 days advance notice to the parties and to the Commission
- election by Transition Administrator/Trustee to withdraw from arrangement—requires 14 days advance notice to the parties and to the Commission; may require ongoing monetary obligation or duty of Transition Administrator/Trustee, as applicable (for example, to support transition)
- change of control of Transition Administrator/Trustee—requires approval of Nextel (so long as Nextel is not then in Default under the Report and Order) and the Commission, which approval shall not be unreasonably withheld but which may be conditional
- replacement/successor Transition Administrator to be selected by the search committee pursuant to this *Report and Order*
- notice procedure - specifies which notices shall be copied to the Commission
- Note: language to be harmonized as appropriate if the Transition Administrator is a natural person rather than an entity

Terms Specific to Tri-Party Agreement

- tasks the TA with working with the Trustee to set up the trust
- tasks the TA with designing the payment system subject to reasonable approval of Nextel and the Trustee (up front payments vs. progress payments; timing and logistics of payments in conjunction with the LOC system [for example, clearly defining when Nextel's payment obligation arises, logistics for transmitting payment requests to Nextel, etc.]; how to handle true-ups [either a payment made in excess of an estimate, or a refund collected if the estimate exceeded actual cost]; logistics for obtaining payment approvals, including the approval of Nextel, and for resolving disputes related to payment amounts)
- states the Transition Administrator will not handle any project funds; specifies procedures for the TA to turn over funds it may receive in connection with the project to the Trustee
- specifies how the Trustee will dispose of any refunds it may receive during or after the relocation process
- specifies the Trustee will follow the details of the payment system devised by the TA pursuant to the Tri-Party Agreement
- tasks the TA with developing a system to ensure vendors are not filing mechanics liens or equipment financing liens against the licensees in connection with the transition (or, in the alternative, tracking the release of liens in connection with payments to vendors)
- tasks the TA, as the project manager, with creating a standardized bid package for use by the municipality licensees—including a standardized scope of project, and a standardized documentation package. NOTE: The standardized documentation package could contain the requirement that the vendor obtain a performance bond, which bond would be paid for via the LOC proceeds as part of the cost of the transition. The standardized bid package would be subject to Nextel's reasonable approval.
- tasks the TA with developing standardized bidding procedures for the municipal licensees to follow
- specifies that neither the Trustee nor the Transition Administrator bears the risk that a particular vendor fails to perform, and allocates such risk between Nextel and the licensees—since the municipality/licensees will have control over the award of the contract, it is reasonable they would bear the risk (and where appropriate, the risk could be managed via the performance bond mentioned above)
- specifies additional terms of a customary nature in agreements for management of a project by a third party Project Administrator
- specifies additional terms of a customary nature in agreements for management of payments by a third party Paying Agent (to the extent not covered in the documentation establishing the trust)
- specifies details of dispute resolution mechanisms, including time frames and escalation procedures

- specifies the rights of Nextel vis-à-vis the relocation process absent an event of default by Nextel under the Report and Order
- during the continuance of an event of default by Nextel under the Report and Order, specifies the remedies of the TA and the Trustee (i.e., the consequences to Nextel, such as Nextel losing veto rights concerning a project's cost)
- specifies record-keeping and reporting obligations of each party pursuant to the Report and Order
- specifies audit and inspection rights of Nextel and the Commission, including allocation of costs thereof
- specifies details concerning fees and expenses to be paid by Nextel to the TA and to the Trustee; fees and expenses of the Transition Administrator to conform to notification of Search Committee pursuant to the *Report and Order*
- specifies how the TA and Trustee may be paid in the event of a default by Nextel in the payment of fees to the TA and/or the Trustee -- including a mechanism whereby relief may be sought from the Commission authorizing the proceeds of the LOC be applied against such fees
- specifies that the Tri-Party Agreement may not be amended, modified or rescinded without approval of the Commission
- specifies an order of precedence—that the Tri-Party Agreement would govern in the event of a conflict between the terms of the Tri-Party Agreement and the terms of a bilateral agreement among two of the parties
- specifies a procedure and criteria for Transition Administrator to certify that the 800 MHz relocation is complete, which certification shall allow TA, with Commission's concurrence to seek termination of the Letter(s) of Credit. Termination will also trigger early termination of the Trust and Tri-Party Agreement
- specifies items for which the Transition Administrator may properly seek draws under the Letter of Credit, consistent with the *Report and Order*
- specifies items for which the Transition Administrator may not seek draws under the LOC (such as reimbursement of UTAM, relocation of BAS incumbents) consistent with the *Report and Order*
- specifies that the corpus of the trust(s) shall be forfeit to the U.S. Treasury in the event that Nextel fails to make any of the payments to the Treasury specified in the Commission's *Report and Order*
- specifies responsibilities and guidelines for record-keeping, accounting and dispute resolution related to calculation of the offset described in the *Report and Order*.
- specifies responsibilities and timeliness related to certification of project completion by the Transition Administrator and rendering of the final accounting required in the Report and Order.

**SEPARATE STATEMENT OF COMMISSIONER
MICHAEL J. COPPS
*Concurring***

RE: Improving Public Safety Communications in the 800 MHz Band (Supplemental Order and Order on Reconsideration; released December 22, 2004).

In this order the Commission resolves many important issues related to our effort to reduce interference to public safety in the 800 MHz band. I am pleased that we are taking this step and support the result of this order, which moves us significantly closer to the initiation of a successful rebanding process.

I am uncomfortable, however, with the decision to change the valuation of Nextel's spectrum by close to half a billion dollars -- an increase of nearly twenty percent. While I believe that Nextel has demonstrated that its spectrum holdings are different than the assumption we made in the original order, I am concerned that the process that the Commission has used here to determine value has become too imprecise. Given the short time available, I do not believe that the Commission had the capacity to independently pinpoint the exact nature of Nextel's holdings, as we do here but did not do in the previous order. Additionally, if we must reassess the value of Nextel's spectrum, I would have preferred to reassess the MHz/POP multiplier that we employ in light of changes in the marketplace and transactions that occurred after we adopted our first order. Given the magnitude of the valuation at issue, I will therefore concur.

**STATEMENT OF
COMMISSIONER JONATHAN S. ADELSTEIN**

Re: Improving Public Safety Communications in the 800 MHz Band; Supplemental Order and Order on Reconsideration; WT Docket No. 02-55

Everyone agrees that the top priority of this proceeding has been resolving the 800 MHz interference problem currently experienced by our nation's first responders. In addressing that critical goal, though, one of my next top objectives has been to minimize the impact of our decision on 800 MHz licensees not directly affected or implicated by the interference problem. Over the last decade or so, the 800 MHz band has evolved into one of the premier land mobile radio communications bands and is now the home to thousands of licensees from all sectors of industry and state and local government. I have worked hard to protect the rights of these licensees during this proceeding because it simply is the right thing to do.

In this regard, I am pleased to support the clarifications in this Order addressing the relocation of one group of 800 MHz licensees – those non-Nextel, non-SouthernLINC licensees who hold Economic Area (EA) licensees. We rightly confirm that existing ESMR licensees like AIRPEAK and Airtel have the option to be relocated at Nextel's expense to the ESMR portion of the band (862-869 MHz). We also clarify that site-based licenses used within ESMR systems can be relocated at Nextel's expense to the 862-869 MHz block – even if they are not located within the licensee's EA – provided that the conditions laid out in paragraph 163 of the 800 MHz Report and Order are satisfied. If ESMR licensees think that this standard is too restrictive for certain operational sites in their system, they should file a waiver request detailing why this outcome is not in the public interest.

In the item, we also provide an opportunity to EA licensees who presently do not meet the ESMR definition but are interested in operating an ESMR system in the above 862 MHz band. These licensees can choose to move to the ESMR band and retain the "white space" they currently hold through their EA license provided they are willing to operate a cellular system in the band pursuant to technical rules clarified in this item. In the alternative, these EA licensees can remain in the band below 862 MHz, and operate "high-site" systems. The choice is theirs, and that is the right outcome of this proceeding.

Finally, I very much appreciate the support of my colleagues and the hard work of the Wireless Telecommunications Bureau in providing for the important clarifications in this Order.